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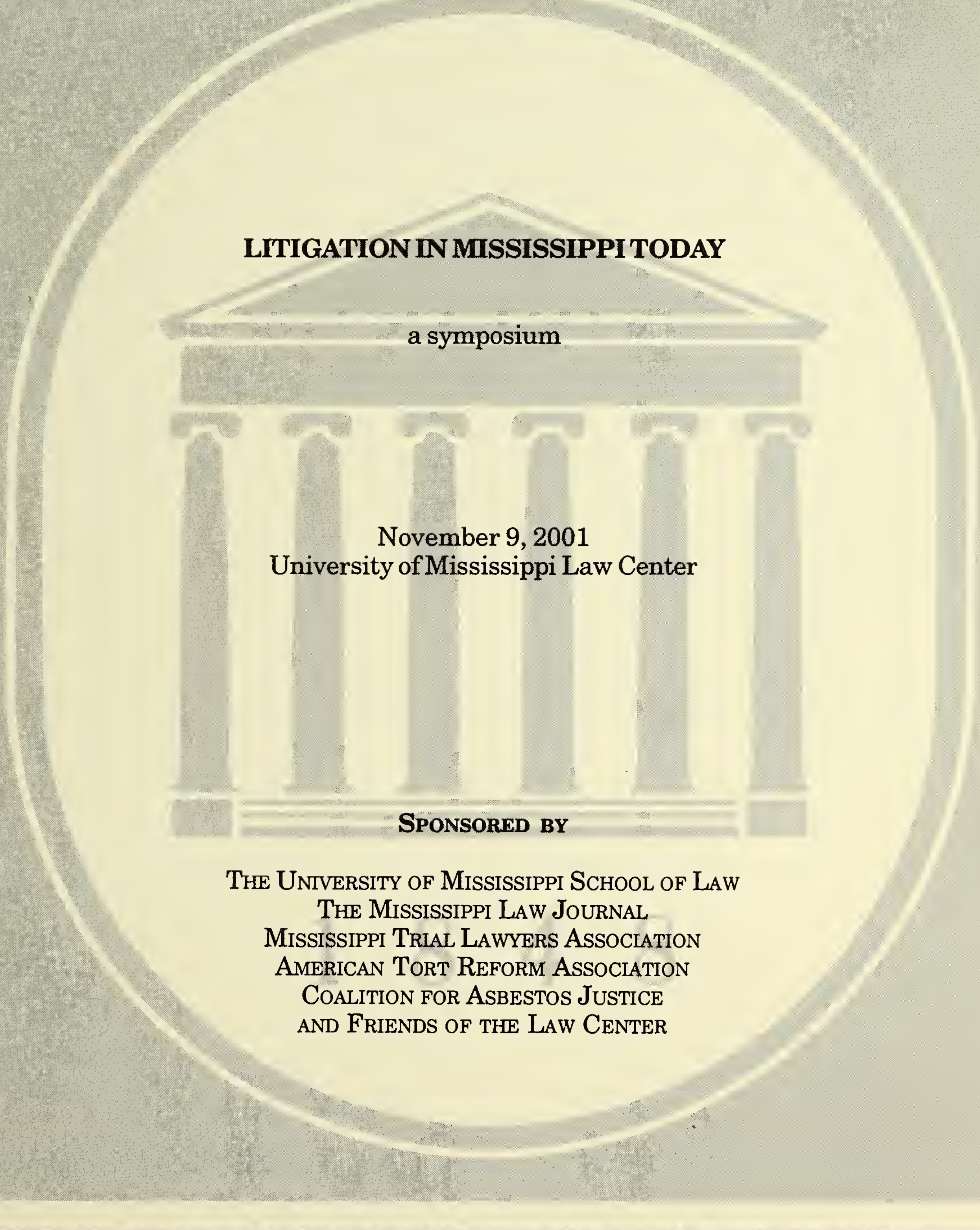

LITIGATION IN MISSISSIPPI TODAY

a symposium

November 9, 2001
University of Mississippi Law Center

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VOLUME 71 **WINTER 2001** **NUMBER 2**

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A SYMPOSIUM

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There is without any question in this country
in the past twenty years a marked tendency
for juries to award and courts to uphold
increasingly larger verdicts for death and
personal injuries, many times larger than were
sustained or upheld a generation ago. That is true.
Now the question to which I address myself is this:
Is that a good thing or a bad thing?

—Francis H. Hare, Proceedings of the Fifty-Ninth Annual Meeting of the Mississippi State Bar, *Mississippi Law Journal* vol. 35 (1963-64)

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DICK THORNBURGH

Dick Thornburgh, counsel to Kirkpatrick & Lockhart LLP, has served as Governor of Pennsylvania, Attorney General of the United States and Under-Secretary General of the United Nations during a public career which spanned over twenty-five years.

Thornburgh is a long-time advocate of civil justice reform. In 1991, under the auspices of the White House Council on Competitiveness, Thornburgh as Attorney General issued the *Agenda for Civil Justice Reform in America*, the document upon which many of the civil justice reform proposals currently being pursued are based. Since his return to the private sector, Thornburgh has delivered scores of speeches, met with federal and state legislators and other officials and has made a variety of media appearances advocating comprehensive federal and state civil justice reform.

A native of Pittsburgh, Thornburgh was educated at Yale University, where he obtained an engineering degree, and at the University of Pittsburgh School of Law where he served as an editor of the Law Review. Thornburgh served as director of the Institute of Politics at Harvard's John F. Kennedy School of Government (1987-1988) and has lectured at numerous other institutions.

It is with much pleasure that we welcome General Thornburgh to The University of Mississippi School of Law.

SPECIAL THANKS

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INTRODUCTIONS AND WELCOME

Charles S. Hewins
Carolyn Ellis Staton
Judge Michael P. Mills

MR. HEWINS: Good morning. I want to thank y'all for coming. This is a pretty exciting day for me. Great program. Wonderful panelists. And I don't want to delay things by talking up here too much. I just want to thank briefly a couple of people, especially my co-chair and Mark Behrens. I don't know if they're here yet or not, but they did a lot to help us get a lot of these wonderful panelists. So we're greatly indebted to them. Krisi Lee, who is the editor-in-chief of the Law Journal, worked just about as hard as I did on this thing, as well as Polly Montgomery, Tobi Longwitz and Ashley Cannady, who are second-year members who also worked quite a bit. So thank you to them. Let's give them a round of applause. (Applause.)

Our featured speaker this morning is going to be Judge Michael Mills from the Northern District of Mississippi. Introducing him will be Dr. Carolyn Ellis Staton. Dr. Staton is currently the Provost and Vice Chancellor of the University of Mississippi, but she's most fondly remembered as a professor here at the Law School and as interim dean for a brief time as well. So I'd like to introduce Dr. Staton.

DR. STATON: Thank you and welcome to Ole Miss and to the Ole Miss Law School. It's my privilege today to introduce a former student of several of us in the room, Judge Mike Mills. Mike graduated from the University of Mississippi in political science in 1978 and took his law degree here in 1980 and was in the earliest batch of my first students, and I have the very fondest memories of him and knew then that he was going to go somewhere because he was very judicious even as a youngster. Mike served on the Moot Court Board here which is a wonderful training ground for our future litigators.

I think Mike was probably a head of the appellate division which served him well in his stint on the Mississippi Supreme Court. After private practice, Judge Mills went into the Mississippi Legislature and was a key figure there for a number of terms and then served on the Mississippi Supreme Court. It is a true honor to have Mike move to the district court—federal district court—and we are pleased that he has come to Oxford as his site. I welcome Mike Mills.

JUDGE MILLS: Y'all please remain seated. I am delighted to be here. And looking around this room—I don't know who put this group together, but if you can hold this coalition together, you can anoint the next king of Mississippi. There's no doubt about it. I'm going to make a few remarks early on that I hope will—at least you'll give some thought to my thoughts on how we select judges in Mississippi.

I have recently written an article for the *Quinnepac Law Journal*—I participated in a national symposium on judicial independence nationwide. And I don't think I had given a lot of thought to what we want out of judges until I started working on this particular paper and looking at judges in Mississippi as compared to the rest of the world. As you know, in Mississippi we elect all of our judges: trial court judges, justice court judges, supreme court justices, courts of appeal judges.

And there has been a great deal of discussion about the selection process of judges particularly over the last couple of years. I have traditionally favored some sort of appointive process for appellate court justices particularly. And I wanted to briefly give you some idea of my thoughts and try to explain better to you why I support the appointment of appellate court judges and justices with a little more depth than you read in the newspaper when I see myself quoted.

We have a healthy dose of Jacksonian populism in Mississippi. Our people love elections. My home county, in Ittawamba County, elections are about the best entertainment we have. We don't have a national football team in Fulton. We don't have a symphony orchestra. We have elections. And elections are a means of upward mobility for young folks like me. It's a good-paying job.

It is very important to people to feel like they have a voice in selecting their leaders. And if you try to talk to them, as I have in the past, about appointing judges, they think you're committing treason. They want to elect public school teachers and rural mail carriers. They think the system would work better. And I think that view, without being necessarily articulated that well, is very common in Mississippi.

But I want you to think about why we elect judges. There are two reasons or there are two trains of thought, in my view, on why you elect anybody for anything. You want accountability. The purpose of electing public officials, whether it's a supreme court justice or a local justice of the peace, is accountability.

Under a perfect process, we would hope that that accountability would be to the voters. That's the people who select the public officials. And I think, without verbalizing it, that's the argument that is made by my friends here today who zealously would defend their right to elect judges. As well as we want to make them accountable.

There is another thought process that is used in the federal system, and it was best explained by Alexander Hamilton in the Federalist Papers where our founding fathers said we don't want accountability for judges. We want independence. If they are accountable to anything, they should be accountable to the law. We want an independent judiciary. It is very hard to have an independent judiciary when the people who serve in those offices are accountable to someone other than the law.

So I would urge you to give consideration to that idea. Do you want independence or do you want accountability? I prefer to have an independent judiciary. I think it's most critical at the appellate court level. And I think the failure of Mississippi to have a truly independent judiciary has helped contribute to the spiralling cost of elections in Mississippi and to the image that I saw referred to earlier in some of the documents for today of being a place where we have runaway jury verdicts. Think long and hard how independent a person can be whether he is supported by the plaintiff's bar or the defense bar who must raise $800,000 to run for public office today.

It at least creates the appearance that justices are accountable to the people who supported them, and that's really what democracy is all about, isn't it? You're supposed to help the folks that got you there. I don't know that that should work in the legal field. Well, I tried to create an appointed judiciary in 1993 when I was chairman of Judiciary [Committee] in the House, and we brought out the court of appeals or the legislation creating the court of appeals.

The original legislation provided for an appointed Court of Appeals. It came out of the Judiciary [Committee] much to the surprise of many people. We took it on the floor of the House. I thought it was eminently good government. I couldn't see how anyone could argue against it. And one of my fellow members of the House of Representatives got up and had an amendment to make them all elected. And made a great argument—a great emotional appeal—to the legislative body to make them judges go out there and eat "cold taters" like the rest of us.

It was his theory, under the "cold tater" theory, that if democracy is bad enough for us, it's bad enough for judges. And he amended the legislation to make them elected. And as far as I know, that's as far as we have gotten in Mississippi on having an appointed appellate judiciary in the last forty or fifty years.

But just because we haven't been able to accomplish it, doesn't mean that we should quit trying. I have been elected a number of times to public office. I've been appointed twice. The most recent appointment, where you have to go through a grueling FBI investigation, immigration and natural services, all these groups, is just about as tough as an election for those of you who have been through a background investigation.

I would hope that you would give some thought to recommending to the legislature that you have an appointive process for appellate court justices—judges and justices; that you have a rigorous background investigation; and that we make our target for the judiciary in Mississippi the hope of having an independent rather than an accountable judiciary.

I want to thank all of you for coming today, and for those of you who've been long time friends, I'm now in the Federal Building downtown. Come see me if you get a chance. Thank you very much.

WHY ARE WE HERE, OR HOW DID A STATE WITH FEWER THAN THREE MILLION PEOPLE BECOME LAWSUIT CENTRAL FOR THE UNITED STATES?

PANELISTS:

George Cochran, Moderator
Sherman "Tiger" Joyce
David W. Clark
Shane F. Langston
Andy Birchfield

MR. HEWINS: Okay. We're a little bit early, but I guess we're going to get right on to the next panel if that's all right with everybody. I think it is. All right. The moderator for this panel is George Cochran. He's a professor here at Ole Miss. He's been here for quite some time. During the summer he teaches at Fordham Law School, and also another thing that he does right now is defense work for lawyers that have been sanctioned in court for one reason or another. So, I'd like to introduce George Cochran.

MR. COCHRAN: No election for law professors. Okay? We all know why we're here and so does the nation. Fox news April of this year, Britt Humes Production: Where do trial lawyers go to file suits where they can get huge damage awards against big corporations? Specifically, Mississippi. Jefferson County. In that newscast we had Sherman Joyce, one of our panelists, interviewed along with Shane Langston. So two of our panelists were on Fox News on this issue.

National Law Journal, Mark Ballard. Where is Mr. Ballard? I wonder if he is here today? One of his articles in the National Law Journal—lead article talking about tiny impoverished Jefferson County is where lawyers sue multinational corporations and receive huge compensatory and punitive damage awards. Interviewed for that article was Mr. Jere Beasley. Mr. Beasley can't be here this morning; he just—from Montgomery, Alabama. He's in trial, but one of our panelists was interviewed there.

Then the *New York Times*, August 20th, an article by Robert Pear entitled "Mississippi Gaining as Lawsuit Mecca." A couple of interesting points in the *New York Times* article. Listen to this. "Since 1995 Mississippi juries have returned at least 19 verdicts of 9 million or more including five that exceeded a hundred million." Targeting Jefferson County, which seems to be on everybody's mind, that is a county of less than 9000 residents. An affidavit filed in June in a case there, after research, says that more than 21,000 people have been plaintiffs in Jefferson County from 1995 to 2000. Wow!

Well, what I like about the issue that was raised today is that it's kind of like abortion; there is no middle ground; and we're into a "take no prisoners" scenario. And each side, I think, is wonderfully represented this morning. On the plaintiff's side, as I mentioned before, Jere Beasley—and on your program Jere Beasley is listed. He is the senior partner in Beasley, Allen, Crow, Methvin, Portis and Miles. He is in trial today, and his place has been taken now by Mr. Andy Birchfield. Andy, from what I have here, is head of the mass torts section of Mr. Beasley's firm. A Lexis search—here's a little kicker for Beasley's firm—a Lexis search shows that his firm has secured in verdicts and settlements an amount exceeding $2 billion. What span is that?

MR. BIRCHFIELD: Since the firm was formed in 1978.

MR. COCHRAN: $2 billion; that's not bad. Then, of course, we have Shane Langston who everybody knows, I'm sure; he's senior partner in Langston, Sweet, and Freese in Jackson, Mississippi. He is also one of our own graduates. He's been selected as the Outstanding Trial Attorney in Mississippi and also now serves as President of the Mississippi State Trial Lawyers Association.

On the defense side is Sherman "Tiger" Joyce. Okay. He's president of the American Tort Reform Association since 1994. What—if you want to know how important this guy is, he was selected as one of the nation's leading lawyers under forty by the *National Law Journal*. And finally, David Clark, partner at Bradley, Arant, Rose, and White in Jackson. For those of y'all that are interested in what David does, just talk to any insurance company, bank or corporation in Mississippi where all these folks are seeking David as their defense counsel.

Now, this segment goes to 10:15. I've been instructed that each panelist gets twelve minutes. So the way—Shane Langston does not like this, but it's going to have to go this way. The way I am going to work it is the plaintiff's side will go first with twelve minutes each. Then the defense side will go twelve minutes each. Now, if that works out, that leaves twenty-seven minutes for questions. I think that'll work pretty well. So let's start with the plaintiff's side, and you all can figure out which goes first. Okay? Thank you.

MR. LANGSTON: Thank you, George. Is it okay if we just sit down while we do this?

MR. COCHRAN: It's your audience. Do what the audience wants.

MR. LANGSTON: First of all, I want to thank Mr. Hewins, and the entire *Mississippi Law Journal* for sponsoring this symposium. I think it is very important particularly in today's litigation climate here in Mississippi and what really impresses me is that the *Law Journal* and the University of Mississippi Law School did try, and I believe accomplished the goal of providing a balanced panel so that you can hear from the different viewpoints on these important issues.

I told George that I didn't object to going first, but I'm just accustomed to going first and last. The way he had it set up, I only get to go first. But with that said, I'm—these are pretty broad topics. George is right. Mississippi has gotten a lot of national exposure regarding jury verdicts in Mississippi and the litigation climate in Mississippi. And I want to talk about that.

Some of the groups and associations that are speaking to you today, that are members of our panel, it's our perception and my perception that particularly some of these outside groups like the U.S. Chamber of Commerce and ATRA, the

American Tort Reform Association, and groups even within Mississippi, they use misinformation and they try and create a litigation hysteria-type environment. And I think their purpose is multifold.

First of all, some of these groups, that's their existence. If there's no reform that needs to be accomplished, then they're out of a job. Their organization's out. They look for a state. It's like a road show. They go from state to state. Mississippi isn't the first state, and it's not going to be the last. It's just the focus of the most current attack. But that's their existence. And they do this with again misinformation in many respects, and I want to talk about a little bit of that.

There was an article written that was published in "Common Sense." It's published by the Deputy Director of the Center for Justice and Democracy, and it's entitled, "The Hypocrites of Tort Reform," and it lists many, many examples of how the individuals, not just individuals, but corporations and these associations who promote tort reform do so on a very one-sided basis. Ninety-nine times out of a hundred, it's to protect business interests and to protect corporate America and to protect the medical community and classes such as that. But the tort reform doesn't go both ways. They don't want tort reform to protect the individuals. They don't want tort reform to protect the injured, to protect the consumers, and some of the many examples—and I don't want to pick on our President because he did do a fine job just recently in nominating Judge Mills to the District Court. And we certainly support that nomination—but just as an example, as we know, our President is—he's kind of—well, he's the tort reform leader right now and has been when he was Governor in Texas.

And this article cites an illustrationist back in 1995 before he left Texas and before he became our President how his daughter was in a fender-bender. And no one was hurt, and the fender-bender involved another vehicle from one of the rental car companies. And the rental car company had allowed someone to lease the vehicle who had a suspended license, and then-Governor Bush, on behalf of his daughters, filed a lawsuit and sued the rental car company. And they ultimately settled for about $2500, but—and as we know, some of these big corporate types and the CEOs that run these corporations they're all anti-lawsuit, anti-lawsuit, anti-lawsuit unless they've been injured or unless their company has been injured.

We see example after example after example of huge multimillion dollar verdicts being returned in favor of corporations, and you don't hear the drumbeat by some of these organizations when that happens. When a corporation has been damaged, and the hypocrisy that we see, it extends nationwide, and it certainly comes right back to Mississippi.

I'm going to cite a study for the Cornell, University National Center for State Courts. Cornell, recently in 2001, just a few months ago, published a study that rebuts the myths of the concerns over punitive damages. Of course, that's one of the primary focuses of ATRA—one of the primary focuses of these tort reform organizations is to limit, restrict punitive damages. And what this study shows—and they blame it on runaway juries, and they blame it on juries that are subject to sympathies and prejudices. And the study shows that, across the nation, that in only two percent of the cases across the nation are punitive damages returned.

And the study shows that, unlike the myths and unlike the propaganda that is used by these tort reform associations, that judges, not the uneducated, like George Dale commented regarding our Jefferson County situation, our Jefferson County residents, not the poor, but judges that are trained in the law and that are trained and sworn to set aside prejudices, award punitive damages in more cases than do juries. The higher percentage of the time judges will award punitive damages as opposed to juries.

There are several other very interesting findings by the Cornell study; in one-third of the cases across the country where punitive damages are awarded, they're awarded in situations such as frauds, fraud and intentional torts. Rapes, assaults, things of that nature.

So that's generally where the punitive damages are awarded across the country, and certainly there are exceptions to that, and there are punitive damages awarded in personal injury cases. And I'm going to talk about that in just a moment. But there is a procedure to handle that in the event that punitive damages are unjust in the event the jury was swayed by prejudice and bias. But these organizations want to ignore that. Again they play on misinformation, and I'm going to bring it home just a little bit.

My friend, colleague, David Clark here, who is here on behalf of Stop Lawsuit Abuse in Mississippi, they—in August of 2001—issued a press release. And in the press release, they applaud Justice Pittman for acknowledging the lawsuit abuse problem in this state. And I'm here to tell you they have taken that out of context at best, and I know that they've taken that out of context. I wish Justice Pittman were here. But I'm not sure what they're referring to by his acknowledgment of the lawsuit abuse problem in Mississippi.

And they also refer to Justice Pittman as promoting a measured reform and suggested that Justice Pittman is promoting tort reform in our state. And they go on to say that, and I'll quote, "Stop Lawsuit Abuse is also very pleased to see that the president of the Mississippi Trial Lawyers Association also admits that there are problems in our civil justice system. We only hope that the acknowledgment of the lawsuit abuse problem by Mississippi's Chief Justice and the nod of agreement by Mr. Langston will spark leadership in the state legislature," etc.

And I'm Mr. Langston. I have no idea what he's talking about. And obviously this press release didn't indicate what in the world they were talking about. Again, it's propaganda. It's myth and what if—they send it to the newspaper; the newspapers publish it. And what's their goal with this propaganda and this misinformation? Well, it's obvious. Number one, their goal is to poison the venire. To poison public opinion. To use—these groups love multimillion dollar damage awards. They love them. They live for that. They rarely ever have to pay them, but they love the headlines.

MR. COCHRAN: One minute.

MR. LANGSTON: One minute? Holy cow. Could I—my colleague said that if you didn't have any objections, he would allow me to have a couple of minutes of his time. Will that be all right? Can I take five minutes of your time? All right. I'm going to run to Jefferson County very quickly. Before I do, could we get this chart up on the overhead very quickly?

All right. This is from the—the source is the Mississippi Supreme Court who analyzed the lawsuits filed in the State of Mississippi for the year 2000. Nearly seventy percent were filed by businesses, businesses suing individuals and businesses suing businesses in our state. Are these groups over here to fix that? Is that the lawsuit abuse problem they're referring to? No. That's not the lawsuit abuse problem they're referring to. They're referring to the injured. They're referring to deaths. They're referring to catastrophic injuries. They're referring to consumer fraud. They're not referring to the businesses that are filing lawsuits across our state. And then they start talking about Jefferson County.

In Jefferson County, in this same article by Stop Lawsuit Abuse, they refer to seven or eight problem counties. I want Mr. Clark to name those problem counties. And I'll tell you virtually every one he's going to name is predominantly black. And I have a problem with that. And they refer to Jefferson County specifically. And this is very troubling, but the Commissioner of our State Insurance Department, George Dale, was quoted in the newspaper referring to the "Jefferson County situation." George Dale indicated and I quote, "That an insurance company"—and keep this in mind. He's an elected official, and he attributes his election to the insurance industry. That's the companies he's suppose to regulate, and he's referring to Jefferson County. "That an insurance company should have a jury of their peers. You can't tell me that someone with a sixth grade education whose only income is public assistance can tell how many millions of dollars a company should pay. That's not a jury of his peers." That kind of rhetoric really bothers me as a resident of this state. Referring to those—the poor and the less educated—as being unqualified to render decisions and to determine facts and render competent, unbiased and impartial decisions.

And again that comes from one of the leaders of our state whose campaign pockets are filled by the insurance industry. But Jefferson County in particular, and I want to use this last example before I take up all of my colleague's time here. I looked at the filings in Jefferson County because some of the articles said, well, there were 629 lawsuits filed in Jefferson County in the year 2000.

Well, there were 629 lawsuits filed in the year 2000. I'm not sure how that number broke down businesses versus tort suits. But as of to date, and we pulled these records yesterday, in the year 2001, and here we are in November, there have only been 187 lawsuits filed in Jefferson County. And that's business, tort, personal injury, domestic—I'm sorry. This is in circuit court—but across the board.

Most of the lawsuits historically in Jefferson County and in most every other county in the State of Mississippi are businesses suing individuals. And these statistics bear that out. So the lawsuits filed in Jefferson County have dropped significantly since the year 2000.

And I'll say this, as far as judgments—as far as judgments being returned—we looked at—and Jefferson County doesn't keep a judgment roll of how many juries return verdicts for defendants. So I don't have that stat. They don't keep a judgment roll on that, but I do have for how many juries have—when a jury returns a verdict for the plaintiff. And there were seventy-six verdicts returned from—in the year 2000 to the present year November 2001. Seventy-six jury verdicts returned in the circuit court in Jefferson County. Sixty-three were in favor of a business suing individuals in favor of the plaintiff. Only eleven were in favor of the plaintiff in a personal injury tort situation. And finally—and I wish—I had some video that I was going to show us, but I'm not going to take any more of my colleague's time.

But the big judgments they're going to talk to you about—you challenge them about these big judgments. Do we need to reform the system? Well, the system is that we have JNOVs, and for a thirty-five-cent stamp, a defense lawyer can file a motion for JNOV or remittitur and have it argued before a judge. And if he believes that the verdict is out of hand, is out of whack, he can remit it.

They rarely do that. Sometimes they do. Sometimes they're affirmed. Oftentimes, they're cut. Frequently, they're cut significantly. If that's not good enough for them, they've got the appellate court system. And do they use the appellate court system? Well, they've got it, and I'm here to tell you they more frequently than not they don't use it. If they think the verdict's out of whack, go to the appellate court system and allow our intermediate appellate court or Supreme Court to do their job.

MR. COCHRAN: Okay. Okay. You're there. All right. You've got thirty seconds.

MR. BIRCHFIELD: Thirty seconds. The theme of our discussion is why are we here? And as Shane alluded to, the battlefront is moving. The front lines of the battle have moved to Mississippi. I'm from Alabama. They moved here from Alabama. In the years past, in the last six to seven years, the tobacco companies, the big insurance companies, the business council poured literally millions and millions of dollars into political and judicial races in Alabama.

They got a large measure of what they wanted, and now they're moving their battlefront—the front lines—moving them west. They've moved to Mississippi. You know, that's—that's why we're here. You know, the real question is where do we go from here? Well, before we can answer that question of where we should go from here, you know, we've got to look at what is the battle?

I mean, what is the war that we're fighting here? And, you know, there is a lot of talk about the impact of large jury awards, and there's a lot of issues about arbitration. There's lots of issues about the appellate review process. There are many little fronts in this war. But the bottom line is this: You know, what's at stake is the fundamental right to a trial by jury, and we should not be mistaken about that.

That is it. I mean, that's what is under attack right here. We've seen large encroachments into the jury box and the power that is there in the jury box. It comes by capping damages whether they're compensatory damages or punitive damages; that is putting restrictions on the jury box. But that's not enough.

Now the battle is moving even farther along. We can do away with the jury system altogether and that's under attack. And we see it everywhere in arbitration. I mean, arbitration takes away the fundamental right to a trial by jury, and it's at stake in this war here. And we should not be deceived about what the war is really about.

We can get caught up in a lot of skirmishes and a lot of fights and about the impact of large verdicts, but we should not lose sight of what's truly at stake. So in order to decide which side of this war you're on I think it's a matter of the heart. And Professor Cochran's right. This is a war like abortion. You're on one side or the other. And it really boils down to a matter of the heart. I mean, is your heart with big business? I mean, do you see big business as providing valuable services? Absolutely they do.

You know they hire—they hire millions of people. They provide jobs. They provide products. They make our lives easier and they do a lot for us. So does big business then, because of what they provide us, should they be free from lawsuits? Should they be free from the potential of a large punitive damage award?

That's the question. If you think that the service that they provide entitles them to immunity if it provides them from that type of protection, then you ought to be on the side of big business. And let's do away with the right to trial by jury.

Obviously, I'm not on that side. My heart is with the people. And I think that if you look at these cases, that's what it really boils down to. And there are a couple of the huge verdicts that, you know, that we see complained about that bring this to light in a very powerful fashion.

Take a look at the *Anderson v. GM* case out in California. Family of six and there was a $4.9 billion verdict returned. What in the world provoked the jury to award $4.9 billion in a judgment against GM? Because they saw what GM had done. GM had done a cost benefit analysis. They knew—they knew in advance what the location of that gas tank would do. They knew the human toll that it would take, and they projected those numbers out. They projected what the cost of a burn death would be, and then they calculated what the cost of the remedy would be. And it would cost about—a little over eight dollars to repair the vehicle, to make the remedy, and prevent the deaths.

It would cost about $2.40 to pay off the burn deaths that resulted from it. They said it's cheaper to pay off the lawsuits. Forget the safety. They put profit over lives. Those types of things will never happen; that type of information will never come to light in an arbitration proceeding; you know, that type of information will never come to light if we take away the fundamental right to a trial by jury. It said—

MR. COCHRAN: (Inaudible.)

MR. BIRCHFIELD: David, can I have a few minutes of your time?

LIFE IN LAWSUIT CENTRAL: AN OVERVIEW OF THE UNIQUE ASPECTS OF MISSISSIPPI'S CIVIL JUSTICE SYSTEM

David W. Clark[*]

Mississippi has developed an infamous national reputation as a "mecca" for civil litigation.[1] In 2001, the *Washington Post*, the *New York Times*, the *Wall Street Journal* and even the *London Financial Times*, featured articles reporting on lawsuit abuse in Mississippi.[2] Articles regarding litigation in Mississippi have also appeared in other newspapers across the country such as the *Chicago Tribune*, the *Los Angeles Times*, the *St. Louis Post-Dispatch* and the *Houston Chronicle*.[3] Locally, Mississippi's *Clarion-Ledger* ran a series of articles in 2001 called "Hitting the Jackpot in Mississippi Courtrooms," which discussed the proliferation of lawsuits and the huge verdicts and settlements produced in Mississippi in recent years.[4]

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[1] Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 30, 2001, at A1 (discussing plaintiffs' lawyers use of unique Mississippi laws to secure jurisdiction over multinational corporations in Jefferson County, Mississippi); Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1 (stating that plaintiffs' lawyers view Mississippi state courts as an advantageous forum for clients), *available at* 2001 WL 26417393.

[2] *See, e.g.*, Kenneth Bredemeier, *Unhappy Clients Bite Back*, WASH. POST, Aug. 27, 2001, at E1 (stating Mississippi jury ordered American Management Systems, Inc. to pay State of Mississippi $474.5 million in contract dispute), *available at* 2001 WL 23189853; Queena Sook Kim, *Court Dismisses Owens Corning Tobacco Lawsuit*, WALL ST. J., May 25, 2001, at B6 (noting Mississippi state court dismissed Owens Corning's lawsuit seeking reimbursement from tobacco companies for billions of dollars paid in personal injury lawsuits), *available at* 2001 WL-WSJ 2864597; Betty Liu, *The Poor Southern County That's Big on Lawsuits*, FIN. TIMES, Aug. 20, 2001, at 5 (stating more than 21,000 plaintiffs have sued in Jefferson County since 1995 even though the county contains less than 10,000 residents), *available at* 2001 WL 25578228; Pear, *supra* note 1.

[3] *See, e.g.*, Deborah Bulkeley, *Heartburn Drug's Liability Curtailed*, CHI. TRIB., Oct. 1, 2001, at N16 (reporting Mississippi Circuit Judge Lamar Pickard

Even the Fifth Circuit Court of Appeals has recognized that Mississippi state courts "have become a mecca for plaintiffs' claims against out-of-state businesses."[5]

A National Harris poll of 824 general counsel and senior corporate attorneys, administered between November 7 and December 11, 2001, ranked Mississippi courts the worst in the country.[6] Of nine categories applicable to Mississippi courts,

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refused to allow jury to consider punitive damages in cases involving drug Propulsid made by Johnson & Johnson), *available at* 2001 WL 4120792; *Diet-Drug Suits Settled, but AHP Merger Still in Trouble*, L.A. TIMES, Dec. 23, 1999, at C3 (noting American Home Products settled hundreds of diet-drug cases in Mississippi in attempt to save planned merger with Warner-Lambert Co.), *available at* 1999 WL 26208230; Ron Nissimov, *Fen-phen Firm Oks $8 Million Settlement,* HOUS. CHRON., Feb. 12, 2000, at A1 (stating Mississippi jury recently awarded $150 million to five Fen-phen patients), *available at* http://www.chron.com/content/archive/index.mpl; *Tobacco Was Real Culprit, Asbestos Firms Say in Suits,* ST. LOUIS POST-DISPATCH, Feb. 18, 2001, at A4 (reporting asbestos companies filed lawsuits in Jefferson County against various tobacco giants), *available at* 2001 WL 4445009.

[4] *See, e.g.*, Beverly Pettigrew Kraft, *Good Drug Blamed For Troubles*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 17A (discerning twenty-seven lawsuits filed against manufacturer of the drug Rezulin in Mississippi Circuit Courts in 2000); Beverly Pettigrew Kraft, *Pharmacies Often in the Middle*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 16A (describing effects of continuous lawsuits against the only pharmacy in Jefferson County) [hereinafter Kraft, *Pharmacies*]; Jerry Mitchell, *$1.2B Drug Lawsuit Opens in Jefferson*, CLARION-LEDGER (Jackson, Miss.), June 18, 2001, at 1A (reporting first Propulsid drug case in nation took place in Jefferson County, Mississippi); Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 1A (reporting that the number of lawsuits in Jefferson County rose from 178 in 1999 to 629 in 2000) [hereinafter Mitchell, *Ground Zero*]; Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 1A (noting that favorable procedural rules and increased severity of jury verdicts have attracted trial lawyers from other states to Mississippi) [hereinafter Mitchell, *Headaches*].

[5] Arnold v. State Farm Fire & Cas. Co., 277 F.3d 772, 774 (5th Cir. 2001).

[6] *See* HARRIS INTERACTIVE, U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY: FINAL REPORT, at 9-10, 16-17 (Jan. 11, 2002); [hereinafter STATE LIABILITY SYSTEMS RANKING STUDY]. The report, which totals ninety-nine pages, provides this "Methodological Overview" at page 6:

these national corporate counsel ranked Mississippi dead last—fiftieth—in eight. These included the worst in treatment of tort and contract litigation, punitive damages, timeliness of summary judgment/dismissal, scientific and technical evidence, judges' impartiality, judges' competence, juries' predictability and juries' fairness. Mississippi courts ranked next to the worst (forty-ninth) in discovery.[7]

Mississippi has been called "a magnet for liability lawsuits,"[8] "a mecca for frivolous lawsuits, with unlimited damages,"[9] a "dumping ground for lawsuits from other states"[10] and "a system gone awry" with "widespread judge and jury shopping."[11] Jefferson County, in particular, has been called "the center for the redistribution of wealth"[12] and "ground zero" for lawsuits.[13] A well-known Mississippi plaintiffs' lawyer has pronounced it one of the "magic jurisdictions."[14]

As this article will demonstrate, Mississippi is perceived as an unusual jurisdiction, where the procedural and substantive laws depart from the mainstream rules found in most other states, and runaway jury verdicts encourage plaintiffs to bring claims in the hope of hitting "jackpot

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> All interviews for *The State Liability Systems Rating Study* were conducted by telephone among a nationally representative sample of senior attorneys at companies with annual revenues of at least $100 million. Of this sample, 44% of the respondents were from companies with annual revenues of $1 billion and over. Interviews averaging 15 minutes in length were conducted with a total of 824 respondents and took place between Nov. 7 and Dec. 11, 2001. The sample was segmented into two main groups. Of the 824 respondents, 86 were from insurance companies, with the remaining 738 interviews being conducted among public corporations.

See also State's Legal Climate "Worst" in Nation, THE GREENWOOD COMMONWEALTH, Jan. 30, 2002; *Survey Lends Support to Tort Reform*, HATTIESBURG AMERICAN, Jan. 24, 2002.

[7] *See* STATE LIABILITY SYSTEMS RANKING STUDY, *supra* note 6.

[8] Pear, *supra* note 1.

[9] *Id.* (quoting Senate Republican Leader Trent Lott of Mississippi).

[10] *Id.* (quoting Roger W. King, Mayor of Fayette, Mississippi).

[11] Steve Stewart, *Mississippi Insurance Commissioner Talks Premiums*, CLARKSDALE PRESS REG. (Clarksdale, Miss.), Jan. 24, 2002.

[12] Mitchell, *Ground Zero*, *supra* note 4.

[13] *Id.*

[14] Richard Scruggs, Esq., *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001).

justice." This article will show that this perception is a reality, and will touch on some of the reasons why the current Mississippi civil litigation system is bad for Mississippians. In addition, the article will discuss the unique aspects of Mississippi law that have contributed to the state's unwanted reputation as an unfair forum for civil defendants. First, the article will look at how Mississippi's unique procedural rules, including the rules concerning joinder of plaintiffs and venue, encourage out-of-state attorneys to flock to Mississippi to file lawsuits. Second, the article will show how Mississippi's substantive laws work in tandem with the state's procedural rules to produce astronomical verdicts. For example, the article will review how the lack of limits on punitive damages and the lack of product seller fairness legislation differ from the law in many other states, ultimately hurting Mississippi consumers. Finally, the article will suggest some changes that could help return justice and honor to Mississippi's courtrooms and reform the state's status as "lawsuit central." By creating a more favorable business climate, Mississippi will be in a better position to attract job-creating businesses and taxpayers into the state and to encourage the growth of job-creating businesses in the state.

Mississippi faces enough obstacles to economic progress as it is. It does not need to add to those impediments the unnecessary burden of a national reputation as the state whose courts are the most unfriendly and unfair to business.

Fortunately, there is something that can be done. Fairness can be returned to our court system, thus improving the economic prospects for the state, while ensuring easy access to the courts for those with legitimate claims.

I. HOW THE PROLIFERATION OF LAWSUITS HURTS MISSISSIPPI

As a preliminary matter, it is important to recognize that Mississippi is not just like any other state. Before 1995, no jury in Mississippi had returned a verdict over $9 million in actual or punitive damages. Since 1995, Mississippi juries have returned at least twenty-one verdicts of $9 million or more, including seven that equaled or exceeded $100 million each.[15] These extremely high verdicts, which are out of step with the rest of the country, provide an incentive for out-of-state lawyers and plaintiffs to bring their cases in Mississippi.[16] Lawyers are spending increasingly large amounts of money to lure potential Mississippi plaintiffs, particularly plaintiffs in some of the counties known for high jury verdicts.[17] Out-of-state lawyers are rushing to the state in ever-increasing numbers to become members of the bar and to file lawsuits in the state.[18] Races for seats on the State Supreme Court have become multi-million-dollar campaigns, as both personal injury lawyers and businesses seek like-minded judges in this increasingly high-stakes enterprise.

The *National Law Journal* has reported national studies of the percentage of verdicts in each state's courts that exceeded $1 million. For the period from 1994 to 2000, Mississippi had the *second highest percentage of jury verdicts over $1 million of all the fifty states.*[19] This placed Mississippi—with its comparatively small population, lack of large businesses, and one of the nation's lowest per capita incomes—far "ahead" of 48 other states, passing all except New York in this dubious category. Mississippi was second highest both for total awards and for compensatory awards alone, and Mississippi's percentage of such extraordinary verdicts was *twice the national average*, 24% versus 12%.[20]

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[15] *See* Jimmie E. Gates, *$100M Verdict: Propulsid at Fault*, CLARION-LEDGER (Jackson, Miss.), Sept. 29, 2001, at 1A (reporting on Claiborne County, Mississippi, lawsuit against makers of Propulsid, Janssen Pharmaceutical, Inc. and its parent company, Johnson & Johnson) [hereinafter Gates, *$100M Verdict*]; Jimmie E. Gates, *Clinton Pair Awarded $23M in Suit*, CLARION-LEDGER (Jackson, Miss.), Oct. 9, 2001, at 1B (discussing medical malpractice case against Jackson HMA, Inc.); Jerry Mitchell, *Staggering Jury Verdicts Draw Calls for Tort Reform*, CLARION-LEDGER (Jackson, Miss.), Oct. 30, 2001 (outlining debate over Mississippi tort reform); Pear, *supra* note 1, at A14.

[16] *See* Mitchell, *In-State Headaches*, *supra* note 4. The number of Alabama lawyers, for example, who obtained admission to the Mississippi bar tripled from 1999 to 2000. *See Advocacy Group Wants to STOP Lawsuit Abuse*, DAILY CORINTHIAN (Corinth, Miss.), July 1, 2001.

[17] *See* Jimmie E. Gates, *Critics Link Lawyer Ads, Big Awards*, CLARION-LEDGER (Jackson, Miss.), June 18, 2001, at 4A (reporting lawyers' use of television and newspaper advertisements to attract clients to possibly sue pharmaceutical companies).

[18] For example, the number of Mississippi Bar admittees living in Alabama has increased 650% over the last two years, going from six in 1999 to forty-five in 2001. Mississippi Board of Bar Admissions listing of those admitted to Bar, 1999-2000; Mississippi Board of Bar Admissions listing of those passing the bar in 2001.

[19] Current Award Trends in Personal Injury, 2001 Edition, Jury Verdict Research Series (LRP Publications, 2002), at 35-36. That represented an increase from just a year earlier, reflecting the state of the spate of huge verdicts in 1995. For the period from 1993 to 1999, Mississippi had the fourth highest percentage

The detrimental effects of Mississippi's litigation system reach beyond businesses and also hurt consumers. For example, in 2001, George R. Dale, Mississippi's insurance commissioner, approved a 65% increase in premiums for malpractice insurance sold to doctors.[21] By the summer of 2001, at least forty-four insurance companies had left Mississippi or stopped selling certain kinds of insurance because of large jury verdicts in the state.[22] Certainly more joined the exodus in the following year. This is leading to a lack of competition in the marketplace and higher prices for Mississippians. While several factors may drive up the cost of insurance premiums, Commissioner Dale notes that one factor that the state legislature can affect is the increasingly anti-business legal climate.[23]

Moreover, with insurance rates increasing, more and more doctors will be encouraged to take their practices to other states. In Greenville, Mississippi, 60% of doctors have seen a 20% increase in their insurance rates, and another 30% have seen insurance rates increase by 75%.[24] A spokesperson for

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of such large verdicts in the nation. *See* Andrew Harris, *Report Maps Million Dollar Verdict States but Trial Lawyers Are Skeptical of the New Study's Award Data*, NAT'L L.J., Feb. 12, 2001, at A4. For the 1993 to 1999 period, Mississippi's percentage of $1 million verdicts was approximately 22% and Alabama's 15%. Alabama's serious tort reform took effect in 1999-2000. *Id.*

[20] *Id.* at 35-38.

[21] *See* Pear, supra note 1.

[22] *See* Reed Branson, *Miss. Tort System in the Balance*, COM. APPEAL (Memphis, Tenn.), Oct. 16, 2001, at B1 (commenting that through judicial appointments to the Mississippi Supreme Court, Mississippi Governor Ronnie Musgrove has tremendous power to influence the ongoing battle between business and plaintiffs' attorneys), *available at* 2001 WL 25855937; Jerry Mitchell, *More Firms Exit Mississippi*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 1A.

[23] Stewart, *supra* note 11.

[24] *See* Cassandra Perry, *Lawsuit Abuse Affects Medical Care*, DELTA DEMOCRAT TIMES (Greenville, Miss.), June 24, 2001, at A1.

one insurance company related the increase directly to higher jury awards and settlements in the state.[25] The increase in insurance may explain why, by the summer of 2001, 324 doctors have stopped delivering babies in Mississippi over the last ten years.[26] In 2001, at least nine physicians in the Mississippi Delta stopped delivering babies when their insurance premiums jumped 20% to 400% (premiums ranging from $40,000 to $110,000) in just one year.[27] Some fear that obstetrics will disappear from the rural areas of the state.[28]

In addition, health insurance for individuals is now more expensive than it was a few years ago. For example, a couple of years ago, a healthy twenty-five-year-old could obtain health insurance for $60 per month, but that same policy cost $150 in the Fall of 2001.[29]

In Tupelo, the largest non-metropolitan hospital in the country is losing physicians because of the litigation climate, and it can no longer recruit qualified specialists to replace them. The region is losing physicians who simply cannot afford the rising number of suits and rising malpractice insurance premiums.[30]

On the employment front, manufacturing jobs in Mississippi have declined from 260,000 in 1994 to 221,500 in May of 2001.[31] That means 15% of manufacturing jobs have left the state in the past few years. The state's reputation as a "tort mecca" has played a role in the job exodus.[32]

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[25] *See* Pear, *supra* note 1; John Porretto, *Many Mississippi Doctors Giving Up Obstetrics in the Face of Rising Insurance Costs*, NEW ORLEANS TIMES-PICAYUNE, Nov. 19, 2001 (reporting that rural Mississippi doctors blame the state's high jury verdicts and settlements for doctors rising insurance costs), *available at* 2001 WL 30246759.

[26] *See* Perry, *supra* note 24.

[27] Jimmie E. Gates, *Malpractice Insurance Rates Forcing Out Some Physicians*, CLARION-LEDGER (Jackson, Miss.), Nov. 19, 2001, at 1A (reporting on drastic increase in medical liability insurance rates for Mississippi obstetricians).

[28] *Id.*; Porretto, *supra* note 25.

[29] *See* Joey Bunch, *Lawsuit-Limit Campaign Launched*, SUN HERALD (Biloxi, Miss.), Oct. 12, 2001, at A2 (concerning National Federation of Independent Businesses' push for tort reform), *available at* http://www.sunherald.com/mld/sunherald/archives.

[30] Reed Branson, *Musgrove Tells Doctors Help Is Coming*, COM. APPEAL (Memphis, Tenn)., May 22, 2002.

[31] *See* John Porretto, *Rural County Known for Huge Verdicts*, SUN HERALD (Biloxi, Miss.), July 2, 2001, at A1.

Plainly, the unbalanced judicial system is hurting the state and the prospects for more and better jobs, better incomes and available healthcare. W.G. Holliman, Jr., the chairman, president and CEO of the largest manufacturer of residential furniture in the world, based in Tupelo, told business leaders that Mississippi's civil justice system is seriously damaging the state's economy. Holliman announced that while he loves his home state and would like to expand the division of his company that is located in Mississippi, the "crisis" in the state's legal system prevents it.[33] Furthermore, if Mississippi-based businesses will not expand because of the judicial climate, what does that say about the state's chances to attract new industry? As Mr. Holliman told Mississippi's business leaders: "[I]f you think you are going to attract other business to this state—run by people who don't already feel the passion for Mississippi that *we* all feel—well, you'd better think again."[34]

Small businesses in Mississippi report that the large verdicts and increased insurance costs are hurting many such companies in the state. According to one report, "[s]ome of these people are [just] getting by month to month."[35]

No one can say how many potential new employers, with new jobs, have decided not to locate in Mississippi because of the state's reputation for lawsuits and the resulting unfavorable business climate. No one knows how many business expansions have been cancelled. Mississippi remains at the bottom of the economic and new jobs list. Similarly, no one can say how much the increased insurance rates raise every Mississippian's cost of living.

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[32] *See* John Porretto, *NFIB Planning to Push Tort Reform,* CLARION-LEDGER (Jackson, Miss.), Oct. 22, 2001, at 4B (reporting National Federation of Independent Businesses will lobby for tort reform in 2002 legislative session).

[33] W.G. "Mickey" Holliman, Keynote Speech at the Mississippi Economic Council Annual Meeting (May 21, 2002), *available at* http://www.msmec.com/programs/2002AnnMeet/KeynoteSpeech052102.html.

[34] *Id.*

[35] *See* Porretto, *supra* note 25.

What can be said is that many of those in a position to know believe that Mississippi's legal climate is the worst for business in the entire country. In addition to a comprehensive national survey of corporate counsel,[36] a 2002 publication by the American Tort Reform Association entitled *Bringing Justice to Judicial Hellholes* listed three Mississippi counties (Copiah, Claiborne, and Jefferson) as among the most unfair state court forums found anywhere in the United States.[37]

So who pays for these huge jury awards and the unfair judicial system, and how? Mississippi and its citizens, "through higher prices, through the absence of essential services, or—in the final analysis—through a shrinkage in payrolls from one end of this state to the other."[38]

II. MISSISSIPPI'S UNIQUE PROCEDURAL LAWS

Mississippi has a handful of procedural rules that, as recently interpreted by our courts, make it a favorable jurisdiction for plaintiffs to bring suit.[39] To appreciate the effect of these rules, imagine that you are a plaintiff with a claim against a large corporate defendant that does business in each of the fifty states. You could bring your lawsuit in any number of states, but you learn that if you bring your lawsuit in Mississippi, your chances for a very high award are better than in almost any other state, and your claim is likely to be resolved more quickly. Wouldn't you, as a plaintiff, come to Mississippi under those circumstances? Out-of-state plaintiffs' lawyers can hardly be criticized for coming to Mississippi to litigate when liberal joinder and venue rules present the best forum for huge awards for their clients' alleged injuries.[40]

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[36] STATE LIABILITY SYSTEMS RANKING STUDY, *supra* note 6, at 9-10, 16-17.

[37] American Tort Reform Association, *Bringing Justice to Judicial Hellholes*, at 10 (2002), available at www.atra.org (last visited Oct. 1, 2002).

[38] Holliman, *supra* note 33. Holliman referred to the crisis in our civil justice system as "that noose . . . around the necks of our entrepreneurs" in the state. *Id.*

[39] *See* MISS. R. CIV. P. 20; MISS. R. CIV. P. 82.

[40] *See id.*

In addition, the joinder and venue rules allow a plaintiffs' attorney to file in the county of his choosing.[41] In a very poor state by national standards, plaintiffs' lawyers are bringing a disproportionate number of their cases in a few of the poorest counties, in which the unemployment rates are far above the state average, and the educational levels are below it.[42] Whether or not these counties provide the best juries to evaluate complicated technical, scientific or other medical information, juries in these counties certainly have returned the big verdicts.[43]

A successful personal injury lawyer in the state says that by suing large corporations in one of these "magic jurisdictions," you "raise the stakes so high that they can't afford to lose or can't afford to go to trial."[44] He further states that "companies that . . . find themselves in the bull's-eye of mass [tort] litigation have very little choice now between bankruptcy . . . or trench warfare . . . in some of these magic jurisdictions."[45]

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[41] *See id.*

[42] *See, e.g.*, LABOR MKT. INFO. DEP'T, MISS. EMPLOYMENT SEC. COMM'N, LABOR MARKET INFO.: QUICK REFERENCE DATA BY COUNTY 4, 7 (Aug. 2001), *available at* www.mesc.state.ms.us/lmi/files/alf/primalf2001.pdf. In August 2001, as in the previous month, two of the favorite venues for the mass joinder lawsuits, Jefferson and Holmes Counties, led the state with the highest unemployment rates. *Id.* Holmes County's unemployment rate was 16.9%, the highest in the state; Jefferson County was second with 16.1%. *Id.* Both of these were several times the state unemployment rate for the same period, 5.1%. *Id.* Those counties also have among the lowest educational levels. *See id.* In 1990, the last year for which comprehensive census results are available, only 48% of the adults (those over age twenty-five) in Holmes County, and only 53% of those in Jefferson County, had graduated from high school. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HOLMES DP-2, 1990 CENSUS OF THE POPULATION: SOCIAL CHARACTERISTICS (1990), *available at* http://factfinder.census.gov/servlet/QTTable?ds_name= D*geo_id=05000US28051&qr_name=DEC_1990_STF3_DP2&_lang=en (Holmes County); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, http://factfinder.census.gov/servlet/QTTable?ds_name=D&geo_id=05000US28063&qr_name=DEC_1990_STF3_DP2_lang=en (Jefferson County).

[43] *See* Mitchell, *supra* note 15 (discussing a recent verdict of $150 million to six plaintiffs in an asbestos case and $100 million to ten plaintiffs in a Propulsid case).

[44] Scruggs, *supra* note 14, at 545.

[45] *Id.*

A. Joinder

1. The Abuse of Rule 20 Joinder

While Mississippi is a good place to litigate for lone plaintiffs, the benefits of Mississippi's liberal procedural rules are even more tangible for a group of several hundred or several thousand plaintiffs who want to bring "similar" claims in the same case. In Mississippi, groups of plaintiffs have been allowed to bring claims as "mass joinder actions" under much less stringent procedural rules than would be imposed on the same type of cases in other states. These mass joinder cases have permitted plaintiffs to join numerous claims that no court outside of Mississippi would deem to be "arising out of the same transaction, occurrence, or series of transactions or occurrences."[46]

There have been suggestions that this unregulated mass joinder has been allowed because Mississippi does not have class actions.[47] In fact, however, many of the cases which the courts in this state have been allowing to proceed as "mass joinders" under Rule 20 of the Mississippi Rules of Civil Procedure would not meet typical standards for class certification.[48] Therefore, in Mississippi today, plaintiffs can aggregate claims that would not be aggregated anywhere else in the country, either under joinder rules or as class actions.

2. The Difference Between Class Actions and Rule 20 Joinder

In *American Bankers Co. v. Alexander*,[49] the Mississippi Supreme Court said that the state does not have class actions and that, as a result, courts have "liberalized the rules of civil procedure" to allow broader joinder under Rule 20 of the Mississippi Rules of Civil Procedure.[50] There are several problems with this. First, the five cases involved in the *American Bankers* appeal were re-filed in state court after they could not be certified as class actions in federal court because they involved individualized circumstances and elements of proof.[51] The class action vehicle was available; the claims and claimants just did not meet the requirements to certify the class in federal court.[52]

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[46] MISS. R. CIV. P. 20.

[47] *See* Am. Bankers Ins. Co. v. Alexander, 98-IA-00046-SCT, 2001 WL 83952, at *6 (Miss. Feb. 1, 2001) (noting that the rules of civil procedure have been "liberalized" to compensate for the lack of a class action rule), *cert. denied* 122 S. Ct. 324 (2001).

[48] *See infra* notes 73, 81.

[49] 98-IA-00046-SCT, 2001 WL 83952 (Miss. Feb. 1, 2001).

Second, confusing "mass joinder" with class actions is problematic because joinder and class actions are two procedurally distinct devices. Joinder, both under the Federal Rules of Civil Procedure and the identical Mississippi Rule of Civil Procedure, allows everyone with a claim to join in the same action if they assert claims "arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the [same] action."[53] When claims of two or more parties are joined, the claims become part of the same action. Although the claims will have some overlapping questions of law or fact, the judge or jury in these cases must consider the claims of each party and apportion damages as to each party.

Class actions, by contrast, have more procedural hurdles to join claims together but present more judicial efficiency if the claims are certified as a class.[54] Under Rule 23 of the Federal Rules of Civil Procedure and many state rules patterned after the federal rule, before a class is certified, the plaintiffs must demonstrate that: joinder is impractical; there are common questions of law or fact; the claims or defenses of the representative parties are typical of those of the class; and the representatives will fairly and adequately represent the interests of the class.[55] The plaintiffs must also show that the common questions of law or fact predominate and that class action is the superior method for resolving the controversy.[56] Thus, meeting all of the requirements for bringing a class action is more difficult than making the "same transaction or occurrence" showing required for joinder. Once the class is certified, however, a class action is much easier to try than a joined action. Since the claims of the entire class must be very similar (if not identical), they are tried through the class representatives, and the judge and jury are required to sort through the law and the facts only as they pertain to the class representatives. Because in class actions all of the claims are adjudicated on the basis of the representatives' claims, trying 1000 plaintiffs' claims as a class action may promote judicial efficiency. In contrast, binding together thousands of claims in a joined action is unlikely to promote judicial economy in the same way because each plaintiffs' claim must be individually heard.

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[50] *Am. Bankers*, 2001 WL 83952, at *4.

[51] The three federal class action lawsuits were *Sims v. Fidelity Fin. & Am. Bankers*, No. 2:96-CV-160PG (S.D. Miss.); *Thomas v. Fidelity Fin. & Am. Bankers*, No. 3:96-CV-35-LN (S.D. Miss.); and *Wilks v. Sunstar Acceptance Corp. & Am. Bankers*, No. 1:96-CV-220-GR (S.D. Miss.). These cases were re-filed from March 6 to September 2, 1997, as the five cases involved in the *American Bankers* appeal. *See also* Appellant's Brief at 3, *Am. Bankers*, 2001 WL 83952.

[52] Appellant's Brief at 3, *Am. Bankers*, 2001 WL 83952.

[53] FED. R. CIV. P. 20; MISS. R. CIV. P. 20.

[54] *See* FED. R. CIV. P. 23.

The cases filed as mass joinders in Mississippi demonstrate that "mass joinder" does not promote judicial economy. One example, *American Bankers*, is discussed below. Two asbestos-exposure actions also provide recent and powerful examples of how mass joinder fails to promote judicial economy.

In *Stephens v. Combustion Engineering, Inc.*, the court permitted joinder of over 2500 claimants suing over 100 defendant product manufacturers.[57] Each of the plaintiffs claimed exposure to asbestos from at least one defendant's product or products, but none of the plaintiffs claim to have been exposed to all defendants' products.[58] Similarly, the plaintiffs did not all work in the same workplace or work over the same period of time.[59] It is difficult to understand how judicial economy could be served by joining claims involving different parties that took place over different periods of time. Yet, this case has been filed as a "mass joinder" and, at this writing, is proceeding.[60]

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[55] In the alternative, plaintiffs may show that there is a risk of "varying adjudications which would establish incompatible standards of conduct for the party opposing the class," or that the defendant has acted or refused to act with respect to the class in general, and injunctive or declaratory relief is sought. *Id.*

[56] *Id.*

[57] No. 11-0010 (Cir. Ct. Jasper County., Miss. filed Jan. 30, 2001).

[58] *Stephens*, No. 11-0010.

A similar example is *Johnson v. ACandS*,[61] a 154-plaintiff case against over 100 defendants.[62] Plaintiffs' counsel selected ten of the plaintiffs as the first "trial group," and the case proceeded to trial on October 4, 2001.[63] The allegations were that the trial group plaintiffs were exposed to asbestos from some of the defendants' products.[64] None of the trial group plaintiffs had claims against all of the defendants.[65] Some of the defendants were in the case only because one or two of the trial group plaintiffs made claims against them.[66] The products to which each plaintiff was exposed were different; the employment history (i.e., place of exposure) was different for the plaintiffs; and the type and duration of exposure to different products was different for each plaintiff.[67] Yet, all of the evidence was presented against all of the defendants. When would the other 144 plaintiffs' claims be tried? The plaintiffs' attorneys' hope is that a shocking verdict for the trial group plaintiffs, or the possibility of this happening, will force the defendants to settle the remaining cases, as well as other cases handled by those attorneys for other claimants.[68]

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[59] *Id.*

[60] This case provides a good example of how the "mass joinder," as allowed to proceed by several state courts, is not functional or efficient. When a special master appointed by the court required the plaintiffs to provide "core discovery"—including each plaintiff's place of residence (i.e., state and county) and workplace(s) where he/she claimed to have been exposed to one or more of defendants' products—before plaintiffs could proceed to trial with any of the plaintiff "trial groups," the plaintiffs changed course. In a Motion to Dismiss Enumerated Plaintiffs, served February 6, 2002, plaintiffs' counsel proposed to dismiss the vast majority of the plaintiffs, "leaving a smaller group of three hundred plaintiffs who share several jobsites." Motion to Dismiss Enumerated Plaintiffs at 1, *Stephens*, No. 11-0010 (filed Feb. 6, 2002).

[61] No. 2000-181 (Cir. Ct. Holmes County, Miss. argued Oct. 4, 2001).

[62] *ACandS*, No. 2000-181. Unlike many of the mass joinder cases, thanks to extensive advertising and "screening" of potential plaintiffs in Holmes County, most of the plaintiffs, including seven of the ten in the "first trial group," lived in Holmes County. Thanks also to the intensive plaintiff-solicitation in the county, several of the members of the venire had actually been screened or tested or had attended one of the several "information sessions" held by personal injury lawyers at night *in the very courthouse and courtroom in which this case was being tried. See* Defendant's Petition for Interlocutory Appeal, *ACandS*, No. 2001-M-1588 (Oct. 8, 2001).

[63] *ACandS*, No. 2000-181.

[64] *See id.*

[65] *Id.*

[66] *Id.*

Another indication that "mass joinder" does not promote judicial economy is the fact that, in the federal system, joinder is not used to aggregate hundreds of claims into one action. The point at which federal courts have found joinder to be impractical is far below the number of claims that are often joined in Mississippi.[69] While there is no magic number at which joinder becomes impractical, in general, federal courts have held that in cases with more than forty plaintiffs, joinder becomes impractical; the judicial economies created by joining parties in one action are outweighed by the confusion created by having such a large number of plaintiffs in a single action.[70] Federal court practice provides a powerful statement about judicial economies in cases involving more than forty people.[71]

3. How the Court in *American Bankers* Misapplied Rule 20 and Increased Confusion as to the Proper Standard for Joinder in Mississippi

Joinder is permitted in Mississippi when claims "aris[e] out of the same transaction, occurrence, or series or transactions or occurrences."[72] Neither federal courts nor Mississippi courts have come up with a bright line rule for determining when parties' claims "arise out of the same transaction or occurrence."[73]

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[67] *Id.*

[68] *Id.* Indeed, the threat of such an irrational verdict led all but three of the defendants to settle, either prior to or during trial.

[69] *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.22 (3)(a) n.10 (3d ed. 1997) (citing cases from the Third, Fourth, Seventh, Ninth, Tenth and District of Columbia Circuits in which joinder was found to be impractical where there were forty or more plaintiffs).

[70] *Id.*

[71] It is worth noting that even the exceptions to the federal forty-person general guideline do not include more than 100 joined individuals. *See id.* ¶ 23.22(3)(a) n.12.

In 2001, the Mississippi Supreme Court attempted to provide some guidance on the joinder issue in *American Bankers Co. v. Alexander*.[74] Unfortunately, the *American Bankers* case ultimately raised more questions than it answered. The case was a consolidated interlocutory appeal of judges' joinder rulings in five separate lawsuits, each with numerous plaintiffs, with a total of nearly 1400 plaintiffs.[75] The defendants argued that the plaintiffs' various claims did not "aris[e] out of the same transaction or occurrence," and, therefore, joinder under Rule 20 of the Mississippi Rules of Civil Procedure was improper.[76] The plaintiffs in all of the cases asserted that the defendants defrauded American Bankers' customers by charging the maximum insurance premiums in violation of American Bankers' internal guidelines.[77] American Bankers filed an interlocutory appeal, asserting that the claims were improperly joined.[78] The Mississippi Supreme Court held that joinder of the multiple plaintiffs' claims in each case was proper under Rule 20 of the Mississippi Rules of Civil Procedure.[79]

The confusion created by this decision begins with the court's implication that because the class action rule does not exist in Mississippi, joinder may be used as a substitute. The court stated that it has "taken notice of the unavailability of class actions and has liberalized the rules of civil procedure at times in order to better accommodate parties who are consequently shut out of the legal system."[80] The court was essentially saying that since class actions do not exist in Mississippi, joinder rules will be "liberalized" to accommodate mass litigation that would otherwise be brought as a class action.

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[72] MISS. R. CIV. P. 20.

[73] 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1653, at 408 (3d ed. 2001).

[74] 98-IA-00046-SCT, 818 So. 2d 1073 (Miss. 2001).

[75] *See Am. Bankers*, 98-IA-00096-SCT, ¶ 1, 818 So. 2d at 1074. All of these claims originated as one proposed class action in federal court; however, when the federal court declined to rule that the 1400 claims could be brought as a class action, the claims were re-filed in five separate state court lawsuits. *See infra* note 68 and accompanying text.

[76] *Am. Bankers*, 98-IA-00046-SCT, ¶ 8, 818 So. 2d at 1076.

[77] *Id.* ¶ 4, 818 So. 2d at 1075.

[78] *Id.* ¶ 1, 818 So. 2d at 1074.

[79] *Id.* ¶ 22, 818 So. 2d at 1079.

There are at least five problems with the court's approach. The first is that this result was never intended by the Mississippi Supreme Court when it declined to adopt a rule allowing class actions. Former Chief Justices Armis Hawkins and Lenore Prather have both stated that the Supreme Court did not intend for Rule 20 to be used as a substitute for class action litigation.[81] The goal in not adopting a rule permitting class actions was to avoid the type of mass litigation that Mississippi courts are now witnessing. Former Chief Justice Prather stated that the justices wanted to avoid class actions because they are "burdensome, and our courts [are not] equipped to handle them."[82]

The second problem with the court's statement in *American Bankers* is that, as discussed above, joinder and class actions are distinct procedural devices; one cannot simply liberalize the rules of one to make up for a lack of the other.

A third problem is that the class action option was, in fact, available to the plaintiffs in *American Bankers* if they had met the federal class action requirements. Indeed, the plaintiffs had initially filed their claims in federal courts as a class action, but the court would not certify the claims as a Rule 23 class action. Thus, the absence of a state court class action procedure did not "shut [anyone] out of the legal system."[83]

A fourth problem is that, even if a class action was not feasible, none of the plaintiffs was "shut out" of the legal system. Each, if he or she had a claim, could file his or her own suit. Both the federal and the state procedural rules allow joinder to accommodate claims that are so closely related and overlapping that it is efficient, while being fair to all parties, to join the claims for discovery or trial. There is no legal right to join non-identical claims into an unmanageable, inefficient or unfair mass suit.

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[80] *Id.* ¶ 18, 818 So. 2d at 1078.

[81] Mitchell, *Headaches*, *supra* note 4.

[82] *Id.*

[83] *Am. Bankers*, 98-IA-00046-SCT, ¶ 18, 818 So. 2d at 1078.

A fifth problem with the *American Bankers* decision is that the court seemed to rest its holding on the fact that there was one master insurance policy covering all of the plaintiffs and that the only differences in the plaintiffs' cases were due to their outstanding loan balances.[84] That is useful for future cases involving insurance policies but somewhat less useful in the tort context. Is the manufacture or distribution of a product a "pattern of conduct" sufficient to permit joinder? In another section of the opinion, the court suggests perhaps not. The court distinguished *American Bankers* from a tobacco case in which three plaintiffs were not permitted to join their claims, noting that in the tobacco litigation "each plaintiff's claim arose out of a unique set of facts and circumstances."[85] In most, if not all, product liability or environmental exposure cases, the same will also be true: plaintiffs will have been variously exposed to the product(s) or environmental hazard(s); plaintiffs will claim widely varying injuries; and issues relating to the plaintiffs' or defendants' conduct may be relevant.[86]

Another area of confusion in *American Bankers* comes from the court's statement that joinder was appropriate because all of the claims arose of out the same "pattern of conduct."[87] The phrase "pattern of conduct" is broader than the language of the joinder rule, which refers to a "series of transactions or occurrences."[88] The latter connotes interrelated events, in which the same facts may be at issue, while the former ("pattern of conduct") implicates a much broader set of circumstances. To illustrate, consider two examples of civil claims against a defendant who has committed multiple batteries. Under the language of the rule, it would seem that two or more plaintiffs could join in an action only if their injuries result from assaults at the same time and place. That is, claims could be joined if the defendant injured the two plaintiffs in the same attack as they were walking down the street. Under the broader "pattern of conduct" rule, however, it is possible that many plaintiffs who suffered injuries in different times and places could join in the same suit against the defendant if the defendant's pattern of conduct in committing the acts was similar. Thus, the "pattern of conduct" language is much broader than what is found in the rule itself, and by using this language the Mississippi Supreme Court has greatly expanded the scope of claims that may be joined in one case.

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[84] *See id.* ¶¶ 12, 22, 818 So. 2d at 1076, 1079.

[85] *Id.* ¶ 10, 818 So. 2d at 1076; *see* Insolia v. Phillip Morris, Inc., 186 F.R.D. 547, 550 (W.D. Wis. 1999).

[86] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996).

[87] *Am. Bankers*, 98-IA-00046-SCT, ¶ 22, 818 So. 2d at 1079.

[88] MISS. R. CIV. P. 20; *Am. Bankers*, 98-IA-00046-SCt, ¶ 22, 818 So. 2d at 1079.

B. Venue Rules

Another way in which Mississippi's procedural rules differ from other states' rules is found in Mississippi's venue rule. The relevant Mississippi Rule of Civil Procedure provides that when several parties have been joined in one action, venue is proper for all of the parties if it would have been proper for any of the parties.[89] This allows plaintiffs' counsel to extort exorbitant settlements from corporate defendants by grouping hundreds or even thousands of claims in what a prominent plaintiffs' lawyer has called the "magic" counties.[90]

By contrast, venue rules in other states such as Texas and Alabama provide that when several plaintiffs are joined, venue must be proper as to each plaintiff.[91] Requiring venue to be proper for each plaintiff, as the Texas and Alabama rules do, has a direct impact on cases where out-of-state plaintiffs try to bring suit and on cases where plaintiffs from different counties want to select a particular venue or judge they believe will be more favorable to their claims.

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[89] *See* MISS. R. CIV. P. 82.

[90] Scruggs, *supra* note 14.

[91] *E.g.*, ALA. CODE § 6-3-7(c) (1993 & Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (Vernon 1986 & Supp. 2002).

In both Texas and Alabama, a plaintiff may only bring an action either (i) in the county where a substantial portion of the events giving rise to the claim occurred, or (ii) in the county where the plaintiff resided, or (iii) in the county of the defendant's principal office in the state if the defendant is a corporation.[92] In a products liability case involving out-of-state plaintiffs, the plaintiff may bring his or her case only in the county where the interaction with the product occurred or the county where the corporation's principal office is located.[93] If the exposure to the product occurred outside of the state, the out-of-state plaintiffs are limited to the principal place of business as the only place where they may bring suit.[94] If a similar rule existed in Mississippi, then 5000 plaintiffs would not be allowed to bring their lawsuits in a particular "magic jurisdiction" unless that is where the injury occurred or that is where the corporation's principal office is located. The combined effect of the current joinder and venue rules in Mississippi is that thousands of plaintiffs may join together in a single case, even if the venue is proper for only one of those individuals.

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[92] ALA. CODE §§ 6-3-2(a)(3), 6-3-7(a); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a). In Alabama, a plaintiff can choose to bring the action in the county of the plaintiff's residence. ALA. CODE § 6-3-7(a)(2). Furthermore, the Texas and Alabama rules contain exceptions through which a plaintiff who does not otherwise meet the venue requirement may still be joined in the case if he or she demonstrates that allowing him or her to join in the case is not unfair and promotes judicial economy. *See* ALA. CODE § 6-3-7(c); TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a).

[93] ALA. CODE § 6-3-7(a); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a).

[94] *See* ALA. CODE § 6-3-7(a); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a).

III. SUGGESTIONS FOR CHANGE IN MISSISSIPPI'S PROCEDURAL RULES

A. Clarify and Reform Appeal Bond Requirements

Supersedeas (appeal) bonds provide security that if a defendant appeals an adverse trial judgment, the defendant will have sufficient assets to satisfy the judgment if the appeal is ultimately unsuccessful. Just as appeal bond rules protect plaintiffs during an appeal, however, appeal bond rules must be written so that they do not make it impossible for a defendant to pursue an appeal.

Defendants should have full access to a state's appellate court system to challenge an adverse judgment, just as losing plaintiffs have the ability to test their case on appeal. The defendant's right to an appeal is particularly important if the verdict contradicts settled legal principles, is based on novel and untested theories of liability, is the product of bias or prejudice or is so large as to "shock the conscience" and violate constitutional due process protections.[95]

When faced with an exorbitant judgment and an equally exorbitant bond requirement to stay the judgment pending appeal, many defendants (even large corporations) may be unable to post the bond necessary to pursue an appeal, lest they face bankruptcy. This hypothetical situation became a reality in Mississippi when the Loewen Group was forced to settle because it could not afford to post $625 million to appeal the $500 million judgment that had been levied against it by a Mississippi jury.[96]

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[95] *See generally* Mark A. Behrens & Donald J. Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 29 Prod. Safety & Liab. Rep. (BNA) No. 21, at 515 (May 21, 2001).

[96] *See* Michael I. Krauss, *NAFTA Meets the American Torts Process:* O'Keefe v. Loewen, 9 GEO. MASON L. REV. 69, 83-86 (2000).

1. Recent Reform

The Mississippi Supreme Court in 2001 recognized the need for appeal bond reform in the state when it amended the rule governing the amount of a supersedeas bond that an appellant must post to stay a punitive damages judgment during appeal.[97] Unfortunately, the amended rule lacks clarity and does not go far enough. As written, the rule states that a defendant must post the lower of 125% of the total amount of a punitive damages award or 10% of the defendant's net worth, if the defendant can show that the full bond amount would threaten its financial security.[98] The rule also states that "[a]bsent unusual circumstances, the total amount of the required bond . . . as to punitive damages shall not exceed $100 [million.]"[99]

The first problem with the amendment is that neither the rule nor the comments to the rule explain what is considered "unusual circumstances." With no guidance in this regard, trial courts may find many "unusual circumstances" that justify requiring more than $100 million for an appeal bond as to punitive damages. Second, another section of the rule requires defendants who seek to benefit from the $100 million punitive damages bond cap to provide information to the court regarding the financial condition of the defendant.[100] It is not clear, though, why a defendant's financial condition is at all relevant if the cap applies, as the language suggests, in all situations except "unusual circumstances." Further, as a practical matter, while the amendment is a step in the right direction, a bond of $100 million on a punitive damages award is still high enough to threaten many companies with insolvency.

2. A Better Proposal

In fact, there are excellent arguments that there should be no bonding required for punitive damage awards. The purpose of a supersedeas bond is to ensure that, after appeal, the plaintiff will still be able to recover from the defendant the amounts to which the plaintiff is entitled, even if the defendant in the interim has become unable to pay that amount. Punitive damages, however, are not something to which a plaintiff is "entitled"; the purposes of those damages are to punish the defendant and to deter the defendant from repeating such conduct. If, after appeal, the defendant has gone bankrupt or is in such financial condition that it cannot pay the award of punitive damages, the purposes of punitive damages have been met. The defendant has been punished. The plaintiff has lost nothing to which he or she was "entitled."[101]

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[97] MISS. R. APP. P. 8(b).

[98] *See* MISS. R. APP. P. 8(b)(2)(a)-(b), 8(b)(3).

[99] *See* MISS. R. APP. P. 8(b)(2)(c).

[100] MISS. R. APP. P. 8(b)(4).

If the Mississippi Supreme Court does not eliminate bonding altogether for punitive awards, it should, at a minimum, revise the appeal bond rule to clarify that the $100 million cap is a ceiling on the amount of the bond that may be required in any judgment (punitive as well as compensatory) and that it applies in all cases. Moreover, the Mississippi Supreme Court should consider lowering the maximum amount of an appeal bond that a defendant may be required to pay to $1 million for judgments valued over $1 million and cap the appeal bond at $25 million for judgments valued over $100 million. These limits would serve the essential purpose of appeal bonds while ensuring that defendants have meaningful opportunities to appeal adverse judgments.

B. Return Rule 20 Joinder to Its Requirements and Its Intended Use

There is no need to "liberalize" and thus misapply Rule 20 joinder simply because the state does not have state court class actions. The Mississippi Supreme Court should insist that Rule 20 joinder be applied according to its terms. This is what other courts, both federal and state, in the rest of the country have done. The Mississippi Supreme Court should announce that *American Bankers* is no longer the law and that Mississippi courts should follow the pre-*American Bankers* cases as well as Rule 20 joinder decisions of the federal courts and courts of other states.

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[101] The United States Supreme Court's holding in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), may lend further support to the idea that appeal bonds are not necessary for punitive damages. The Court held in *Cooper* that appellate courts must engage in a *de novo* review to determine whether a punitive damages award is unconstitutionally excessive. *Cooper Indus.*, 532 U.S. at 436. This means that an appellate court should give no deference to a jury's assessment of an amount of punitive damages; instead, the appellate court will be making its own determination of how much, if any, punitive damages should have been awarded. *Id.* at 436 n.9.

C. Reform the Venue Rule

The Mississippi Supreme Court or the Legislature should amend the venue rule to bring it more into line with the rules in other states. Specifically, the rule should be amended to require that, when plaintiffs have joined together in one action, venue must be proper as to each plaintiff. The Texas and Alabama rules are useful models of the type of legislation that could be adopted by the Mississippi Legislature to curb forum-shopping.[102]

D. Consider Adopting a Carefully Limited Class Action Rule

One change that some believe would address some of the problems in Mississippi has already been suggested by Mississippi Supreme Court Chief Justice Ed Pittman. In a recent bar journal article, Chief Justice Pittman suggested that Mississippi might adopt a new class action procedural rule.[103] Several members of Mississippi's legal community have expressed doubt that instituting a class action rule will solve Mississippi's mass litigation problem.[104] The arguments against class actions usually rest on one or more of three bases: that class actions are themselves subject to serious abuse, that only the lawyers benefit from class action settlements (particularly "coupon settlements"), or that a class action rule might permit the same mass actions that are currently brought under the joinder rule, only under a different name.[105] Some of these problems could be addressed by a class action rule in Mississippi, if the rule (i) has the same requirements as the federal class action rule, (ii) includes a reasonable limitation on participation in class actions by out-of-state parties and (iii) is carefully monitored by available access to appellate court review.

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[102] *See* ALA. CODE § 6-3-7 (1983 & Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon 1986 & Supp. 2002).

[103] *See Chief: State Supreme Court Might Adopt Class-Action Rule,* MISS. L. WEEK, Aug. 26-Sept. 1, 2001, at 1.

[104] *See id.*

While nonresidents may use Mississippi's courts, the state is not required to expend its resources to make available a forum and remedy to a plaintiff in another state. Class actions in Mississippi courts should be limited to Mississippi claimants. The sole exceptions to this might be: (1) if the defendant or defendants could be found only in Mississippi, (2) if a putative class member could show that a substantial portion of the events giving rise to his or her claim occurred in Mississippi and he or she would be unfairly prejudiced by litigating the claim in his or her home state or (3) if the putative class members were harmed in the same accident at a single point in time at a discrete location, such as a building fire, a bus accident or an airplane crash.

To avoid abuse of the class action process, any class action rule adopted in Mississippi should have the protection of early and easy appellate review. For example, to limit perceived abuse of the class action process in Alabama, the state in 1999 adopted statutes specifying the class certification procedure[106] and making any trial court's certification order, whether certifying a class or refusing to certify, immediately appealable.[107]

1. Criticism of Class Actions

The current state court class action system is not without criticism.[108] The critics of the current certification process complain that classes are not examined rigorously enough by many state courts before being certified. Currently in Mississippi, however, there is virtually no review of the parties or claims before they are permitted to be joined. Thus, any level of judicial review before certification of a class would provide more scrutiny than occurs under the current liberal joinder rule. Class action critics are comparing a system with some judicial review to a system they would prefer with more judicial review. In Mississippi, we are still working to put in place the requirements that are subject to review in other states.

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[105] *Id.*

[106] ALA. CODE § 6-5-641 (Supp. 2001).

[107] *See id.* § 6-5-642.

[108] *See, e.g.*, Victor E. Schwartz & Leah Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1227-30 (2001) (discussing the problems that result when classes are not rigorous-

2. Class Actions in Mississippi

Other critics maintain that a class action rule in Mississippi would simply result in the substitution of one type of mass action (i.e., class action) for another (i.e., the joinder rule as currently applied). This should not necessarily be the case, however, because a class action rule would provide more guidance to trial courts than the current joinder rule. One of the factors contributing to lawsuit abuse in Mississippi is the dearth of Mississippi jurisprudence on what constitutes proper joinder. As explained above, the Mississippi Supreme Court's most recent statement on joinder in *American Bankers* was contrary to the law in other jurisdictions, as well as in all federal courts, and it created more questions than it answered for trial judges regarding what constitutes the "same transaction or occurrence."

A class action rule, properly drawn, could ameliorate this problem in several ways. First, by giving judges a list of criteria that plaintiffs must meet before a class may be joined, judges would have clearer guidance regarding when certification is appropriate. Second, adopting a rule substantially similar to the federal rule could allow judges to use federal jurisprudence and guidance in certification decisions. If Mississippi

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ly analyzed before certification); *see also* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, CIV. JUST. REP. (Manhattan Inst. for Policy Research, New York, N.Y.), Sept., 2001 (noting that interstate class action lawsuits result in the application of one state's law to citizens of other states), *available at* http://www.manhattan-institute.org/cjr_03.pdf.

had a class action rule like the federal rule, judges could look to the vast number of decisions made by the federal courts to assist them in determining if certification is proper.[109] Of course, the state courts would need to recognize and apply this outside jurisprudence; we would be no better off if our courts ignore jurisprudence from federal and other state courts, as has sometimes been the case with the application of Rule 20 joinder. Third, the availability of a state class action procedure would remove the supposed "unavailability of class actions" justification for "liberalizing" the application of Rule 20 joinder.[110]

IV. HOW THE SUBSTANTIVE LAW OF MISSISSIPPI HELPS ATTRACT LAWSUITS

Mississippi's procedural rules provide a substantial incentive for plaintiffs, and their lawyers, to bring their lawsuits in the state. The procedural rules do not, however, fully explain the current litigation crisis in Mississippi courts. The substance of Mississippi law is also powerful in attracting litigants to Mississippi courts.

A. Punitive Damages

1. The Nature of the Problem

The United States Supreme Court has recognized that, in recent years, punitive damages awards in this country have "run wild."[111] The problem is particularly acute in Mississippi, where at least twelve juries have awarded punitive damages in excess of $5 million from 1996 to the summer of 2001.[112] Punitive damages are awarded in addition to economic damages (i.e., lost wages or hospital bills) and noneconomic damages (e.g., awards for "pain and suffering").

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[109] *See, e.g.*, Amchem Prods., Inc, v. Windsor, 521 U.S. 591 (1997); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (7th Cir. 1995).

[110] *See* discussion *supra* note 69.

[111] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

[112] Mitchell, *Headaches*, *supra* note 4.

They exist, as their name suggests, to punish defendants for wrongful conduct.[113] One of the first principles of punishment, however, is that the punishment should fit the crime.[114] Yet, unlike the criminal context in which there are guidelines for the punishment, in the civil context there are relatively few guidelines for the imposition of punitive damages. As former United States Supreme Court Justice Lewis Powell wrote: "It is long past time to bring the law of punitive damages into conformity with our notions of just punishment."[115] One reason it is so difficult for jurors to assess reasonable punitive damages is that they have no yardstick by which to measure whether punitive damages should be awarded and if so, what amount is appropriate. As Professor Jeffrey Jackson of the Mississippi College School of Law has stated, asking jurors what amount of money is appropriate for punitive damages is like asking them, "On a scale of one to 10 billion, how bright is the light in your office?"[116]

Guidelines for punitive damages are also necessary because jurors in recent years have taken it upon themselves to change the focus of punitive damages. Although punitive damages are intended to punish the defendant in that case for the conduct at issue in that case, jurors often use punitive damages awards to "send a message" to entire industries.[117] One study found over 700 cases since 1990 in which jurors have stated that they intended their verdicts to have an impact beyond their individual cases.[118] The anti-democratic effects of this behavior are clear. Twelve men and women who are neither elected by the public, nor even appointed by the governor, are effectively creating policies that may have a national and industry-wide effect.

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[113] *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Punitive Damages Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1004 (2000).

[114] *See* Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); Weems v. United States, 217 U.S. 349, 366-67 (1910) (holding it is "a precept of the fundamental law" as well as "a precept of justice that punishment should be graduated and proportioned to [the] offense").

[115] Lewis Powell, *The 'Bizarre Results' of Punitive Damages*, WALL ST. J., Mar. 8, 1995, at A21, *available at* 1995 WL-WSJ 2117474.

[116] Mitchell, *Headaches*, *supra* note 4.

[117] *See* Mark Curriden, *Power of 12*, A.B.A. J., Aug. 2001, at 36.

[118] *See id.* at 38.

2. Proportionality: A Better Approach

Approximately one-quarter of the states have enacted legislation to address the problem of excessive punitive damages.[119] One way in which some of these states have reformed excessive punitive damages is by passing legislation that requires punitive damages to be proportional to the compensatory damages in a case.[120] Academic and professional groups, including the American Bar Association and the American College of Trial Lawyers, have also recommended limits on punitive damages awards.[121] The United States Supreme Court has stated that one indicia of whether a punitive damages award is constitutional is the ratio of punitive damages to compensatory damages.[122]

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[119] *See* ALA. CODE § 6-11-21 (1993 & Supp. 2000); ALASKA STAT. § 09.17.020(f)-(h) (Michie 2000); COLO. REV. STAT. § 13-21-102(1)(a) (2001); CONN. GEN. STAT. ANN. § 52-240b (West 1991 & Supp. 2001); FLA. STAT. ANN. § 768.73(1)(b) (West 1997 & Supp. 2002); IND. CODE ANN. § 34-51-3-4 (Michie 1998 & Supp. 2001); KAN. STAT. ANN. § 60-3701 (1994); N.J. STAT. ANN. § 2A:15-5.14 (West 2000 & Supp. 2001); N.C. GEN. STAT. § 1D-25 (2000); N.D. CENT. CODE § 32-03.2-11(4) (1996 & Supp. 2001); OKLA. STAT. ANN. tit. 23, § 9 (West 1987 & Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2002); VA. CODE ANN. § 8.01-38.1 (Michie 2000 & Supp. 2001).

[120] *See, e.g.*, ALASKA STAT. § 09.17.020(f)-(h); FLA. STAT. ANN. § 768.73; IND. CODE ANN. § 34-51-3-4; NEV. REV. STAT. ANN. § 42.005 (Michie 1996); N.J. STAT. ANN. § 2A:15-5.14; N.C. GEN. STAT. § 1D-25; N.D. CENT. CODE § 32.03.2-11(4); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008.

[121] *See* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 15 (1989) (proposing that punitive damages be awarded up to two times a plaintiff's compensatory damages or $250,000, whichever is greater); SPECIAL COMMITTEE ON PUNITIVE DAMAGES, SECTION OF LITIGATION, AMERICAN BAR ASS'N, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 6-11, 8-3 (1986) (recommending that punitive damages awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); *see also* 2 A.L.I., Reporters' Study, *Enterprise Responsibility for Personal Injury*, 258-59 (1991) (endorsing concept of ratio coupled with alternative monetary ceiling).

[122] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996).

The Mississippi Legislature should enact a reform that would limit punitive damages awards to two times the amount awarded to the claimant for economic and noneconomic losses, or $250,000, depending on the size of the defendant business. Where the defendant is a large business, the rule should require the defendant to pay the greater of the two amounts, whereas punitive damages against small businesses should be limited to the lesser of the two amounts (that is, for small businesses, $250,000 would be the maximum amount). Mississippi's small businesses need the lower requirement because a punitive damages award exceeding $250,000 could bankrupt many of them.

Under this proposed reform, juries would still be able to punish defendants for their conduct; the law would simply require that plaintiffs do so in a way that is rationally related to the injury in the case. In addition, such a reform would help curb the self-appointed role juries have increasingly assumed for themselves in regulating entire industries through excessive and possibly unconstitutional punitive damages verdicts.

B. Limits on Noneconomic Damages

Limits on punitive damages, while an important first step in mending Mississippi's civil justice system, may not be enough. Extremely high jury verdicts indicate that limits on noneconomic damages are also appropriate in Mississippi. For example, in October of 2001, a Holmes County jury awarded $150 million to six plaintiffs ($25 million per plaintiff) who had been exposed to asbestos.[123] Not one of the plaintiffs in the case actually had cancer or asbestosis or any other disease caused by exposure to asbestos.[124] None of the plaintiffs was treated by a physician for his "illness," or even seen by one prior to the "screening" by medical personnel hired by plaintiffs' counsel. According to their lawyer, the plaintiffs were healthy enough that they "have not missed a day of work in their lives."[125] This extraordinary verdict was obtained by plaintiffs who allegedly had "precursors" of disease and suffered from an "increased risk of developing lung cancer."[126] In other words, the plaintiffs will receive millions of dollars each because they might become sick in the future.

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[123] *See* Margaret Cronin Fisk, *Verdict of the Week: Jury Awards Six Asbestos Plaintiffs $25 Million Each*, NAT'L L.J., Nov. 12, 2001, at B1; Mitchell, *supra* note 15.

[124] Fisk, *supra* note 123; Mitchell, *supra* note 15.

Noneconomic damages are very difficult to quantify. If limits are placed on punitive damages but not noneconomic damages, it is possible that jurors will express their disapproval of a defendant's conduct by awarding extremely high noneconomic damages. This is what plainly appears to have happened in two recent verdicts of identical $10 million awards to ten co-plaintiffs in one case, and identical $25 million awards to the six co-plaintiffs in another.[127] Allowing juries to use noneconomic damages to "punish" defendants would defeat the purpose of limiting punitive damages. Therefore, Mississippi should limit noneconomic damages in civil cases.

Several states already have laws limiting noneconomic damages that could serve as a model for Mississippi. For example, Alaska limits noneconomic damages to the greater of $400,000, or the injured person's life expectancy multiplied by $8000.[128] Idaho and Maryland have placed limits on noneconomic damages that increase each year to account for wage and price increases.[129] Kansas places a $250,000 limit on noneconomic damages.[130] Hawaii limits noneconomic damages to $375,000.[131] In addition to limits that have been placed on damages in all personal injury cases, a number of states, including our neighbor Louisiana, have capped noneconomic damages in medical malpractice cases.[132] Any of these laws would provide a good model for Mississippi legislation.

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[125] Theresa Kiely, *Asbestos Case Leads to $150M Jury Award*, CLARION-LEDGER (Jackson, Miss.), Oct. 28, 2001, at 5B.

[126] *Id.*

[127] Gates, *$100M Verdict*, *supra* note 15; Kiely, *supra* note 125.

[128] ALASKA STAT. § 9.17.010(b) (Michie 2000).

[129] IDAHO CODE § 6-1603 (Michie 1998) (providing that the limit on noneconomic damages may be increased or decreased depending on the adjustment of average annual wage in Idaho); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (2001) (increasing the limit on noneconomic damages $15,000 each year).

[130] KAN. STAT. ANN. § 60-19a01 (1994).

[131] *See* HAW. REV. STAT. ANN. § 663-8.7 (Michie 1993 & Supp. 2000).

C. The Substantive Law Regarding Innocent Product Sellers in Mississippi

Under the *Restatement (Second) of Torts*, everyone involved in the manufacture and distribution of a product is "strictly liable" if the product possesses a defect that results in injury to consumers.[133] Under Mississippi law, product sellers—including wholesalers, distributors and retailers—are potentially liable for defects that they are neither aware of nor able to discover.[134] The rationale for the rule is that between an innocent manufacturer and an injured consumer, public policy functions against placing the burden on a consumer who might not otherwise receive compensation for his or her injury. However, the problems faced by retailers such as the Bankston Drug Store in Fayette, Mississippi, exemplify the negative results for local retailers due to this rule. The Bankston Drug Store is regularly joined as a co-defendant in pharmaceutical products liability litigation,[135] even though the store's owner has never been found liable in such a case.[136]

Local retailers are almost never joined in product actions so that the plaintiffs can be guaranteed compensation. In fact, the retailer rarely pays damages because in over 95% of the cases where any liability is present, the product's manufacturer is held responsible for the harm.[137] "Based on this showing, the seller receives contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages."[138] In Mississippi, the current law provides that a manufacturer must indemnify a seller for the costs of litigation and damages unless the seller had control over the design, testing or manufacture of the product, the seller altered the product or the seller had actual knowledge of the product's defective condition.[139] Even though sellers may ultimately receive indemnification, involving the seller in litigation generates substantial and unnecessary legal costs, which are ultimately passed on to Mississippi consumers in the form of a "tort tax."

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[132] *See, e.g.*, CAL. CIV. CODE § 3333.2 (West 1997); IND. CODE ANN. § 34-18-14-3 (Michie 1998); LA. REV. STAT. ANN. § 40:1299.42 (West 2001); MASS. GEN. LAWS ANN. ch. 231, §60-H (West 2000); MONT. CODE ANN. § 25-9-411 (2000); N.M. STAT. ANN. § 41-5-6 (Michie 1996); VA. CODE ANN. § 8.01-581.15 (Michie 2000); W. VA. CODE ANN. § 55-7B-8 (Michie 2000).

[133] *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965).

[134] *See* Coca-Cola Bottling Co. v. Reeves, 486 So. 2d 374, 378 (Miss. 1986).

[135] *See* Kraft, *Pharmacies*, *supra* note 4.

[136] *See* Pear, *supra* note 1.

[137] *See* S. REP. NO. 105-32, at 33 (1997).

To be candid, the plaintiff's goal in joining a local retailer is almost always to help the plaintiff "forum-shop" for a verdict-friendly state court venue. First, joinder of the innocent local retailer usually defeats federal diversity-of-citizenship jurisdiction, ensuring that the case will not be removed to and heard in federal court. Second, joinder of the innocent seller—from whom the plaintiffs never really seek or recover damages at trial—may allow for proper venue in a county that otherwise has nothing to do with the dispute between the plaintiffs and the other defendants.[140]

Mississippi has not always punished innocent sellers. In *Sam Shainberg Co. v. Barlow*,[141] the Mississippi Supreme Court held that a seller who sells a product exactly as it came from the manufacturer (or distributor as the case may be) is not liable for defects that may exist in the product.[142] The facts of *Shainberg* were quite simple. The plaintiff purchased a pair of shoes at the defendant's store one day at lunch and wore them that afternoon.[143] That evening she fell and injured herself while wearing the shoes, noticing that the heel had come off one shoe.[144] She sued the shoe's manufacturer and retailer, claiming that the shoe was defectively manufactured.[145] The Mississippi Supreme Court noted that any defect that may have been present was a latent defect, and the retailer had no way of discovering the defect.[146] The court, therefore, held that where a product is transmitted from the manufacturer to the distributor without any change, and from the distributor to the retailer in the exact same condition, the retailer is not liable for any latent defects in the product.[147]

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[138] *Id.*

[139] MISS. CODE ANN. § 11-1-63(g)(i) (Supp. 2001).

[140] *See* Kraft, *Pharmacies*, *supra* note 4. According to Bankston Drug Store pharmacist Traci Swilley, her neighbors were told "'You're not hurting the pharmacy. This isn't against Traci.' They're told that they are suing the huge pharmaceutical companies." Ballard, *supra* note 1.

[141] 258 So. 2d 242 (Miss. 1972).

[142] *Shainberg*, 258 So. 2d at 244-45.

[143] *Id.* at 242.

In *Coca-Cola Bottling Co. v. Reeves*,[148] the Mississippi Supreme Court retreated from its holding in *Shainberg*, holding that a seller or distributor of a product is liable to the same extent as a manufacturer.[149] In *Reeves*, the bottom of a Coca-Cola carton collapsed, causing the glass bottle in the carton to fall to the floor and shatter.[150] The plaintiff was injured when one of the pieces of shattered glass struck him in the eye. He sued, naming the distributor of the drink as a co-defendant. The distributor argued that, based upon the *Shainberg* rule, it could not be held liable for a product it did not manufacture.[151] The court disagreed, holding that the product distributor could be held liable for the injuries that the plaintiff sustained, essentially overruling the *Shainberg* rule. That is why in Mississippi today, the Bankston Drug Store in Fayette, which does nothing other than sell pharmaceuticals, is dragged into numerous drug cases each year. The store is named as a co-defendant in litigation purely to defeat federal diversity jurisdiction and to allow venue to be fixed in a proven corporation-hostile, big-verdict state court.

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[144] *Id.* at 243.

[145] *Id.* at 243-44.

[146] *Id.* at 244.

[147] *Id.* at 244-45.

[148] 486 So. 2d 374 (Miss. 1986).

[149] *Reeves*, 486 So. 2d at 379-80. Although the court in *Reeves* stated that it was not overturning its *Shainberg* holding, the court did go so far as to say that its *Shainberg* holding was "anomalous if not irrational." *Id.* In addition, federal courts in Mississippi apply *Reeves* as if it overruled *Shainberg*. *See, e.g.*, Clark v. Williamson, 129 F. Supp. 2d 956, 959-60 (S.D. Miss. 2000).

[150] *Reeves*, 486 So. 2d at 376.

[151] *Id.* at 378-79. It is worth noting that the plaintiff in *Reeves* did not sue the local convenience store where the subject product was purchased. Because the store was not a party to the action the court did not reach the question of the store's liability. One wonders, however, how the court might have treated the convenience store, which is more closely analogous to the "innocent retailer" in *Shainberg*.

The Mississippi Legislature should correct the problems that have been created by the reversal of the *Shainberg* rule. The current rule is bad for small businesses in Mississippi and fails to ultimately benefit consumers. "[T]he unfairness and illogic of imposing 'strict' liability upon retailers and wholesalers who neither participate in the design process for products they sell, nor create warnings or instructions for a product" should be reversed.[152] Product sellers should be subject to liability only if they are directly at fault for a harm (e.g., mis-assembling the product or failing to convey appropriate warnings to customers), unless the manufacturer of the product is out of business or otherwise not available to respond in a lawsuit.[153] Product seller fair treatment statutes have worked well in other states that have enacted them. Twenty-one other states have enacted product seller fair treatment laws, and none has been repealed.[154]

Product seller fair treatment laws can be drafted so that the seller is excused from liability only if there is a manufacturer who is solvent and subject to jurisdiction in the state.[155] Thus, a product seller fairness law would not affect a plaintiff's ability to recover compensation. Furthermore, the law would not adversely affect the manufacturer, who is required to eventually indemnify the retailer anyway. The effect of the product seller fair treatment law would be felt only by small businesses like the Bankston Drug Store in Fayette. If a product seller fair treatment law were enacted, the store could no longer be joined in every pharmaceutical liability action in Jefferson County, and Mississippi consumers would no longer suffer from the burdensome "tort tax."

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[152] M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 570 (1996).

[153] *See id.* at 33-34.

[154] *See* COLO. REV. STAT. § 13-21-402 (2001); DEL. CODE ANN. tit. 18, § 7001 (1999); GA. CODE ANN. § 51-1-11.1 (2000); IDAHO CODE § 6-1407 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/2-621 (West 1992); IOWA CODE ANN. § 613.18 (West 1999); KAN. STAT. ANN. § 60-3306 (1994); KY. REV. STAT. ANN. § 411.340 (Michie 1992); LA. REV. STAT. ANN. § 9:2800.53 (West 1997); MD. CODE ANN., CTS. & JUD. PRO. § 5-405 (1998); MICH. COMP. LAWS ANN. § 600.2947(6) (West 2000); MINN. STAT. ANN. § 544.41 (West 2000); MO. ANN. STAT. § 537.762 (West 2000); NEB. REV. STAT. § 25-21,181 (1995); N.J. STAT. ANN. § 2A:58C-9 (West 2000); N.C. GEN. STAT. § 99B-2 (1999); N.D. CENT. CODE § 28-01.3-04 (Supp. 2001); OHIO REV. CODE ANN. § 2307.78 (Anderson 2001); S.D. CODIFIED LAWS § 20-9-9 (Michie 1995); TENN. CODE ANN. § 29-28-106 (2000); WASH. REV. CODE ANN. § 7.72.040 (West 1992).

[155] *See, e.g.*, KY. REV. STAT. ANN. § 411.340 (Michie 1992); MO. ANN. STAT. § 537.762 (West 2000). Both Kentucky's and Missouri's statutes condition the

CONCLUSION

Mississippi's reputation as a "lawsuit mecca" hurts Mississippians.[156] It is leading industries that create jobs to avoid the state, discouraging new industrial growth, contributing to a rise in insurance rates and raising the cost of living for every Mississippian. Moreover, attention from the national media leaves the rest of the country with the impression that Mississippi is a backwater jurisdiction. This is a reputation that no one wants for our state.

We can improve the perceived and actual fairness of our state's court system without preventing or impeding the fair litigation of any legitimate claim.

Joinder and venue reform, additional appeal bond reform, punitive damages limits, noneconomic damages limits, the return of the *Shainberg* rule for product sellers and possibly a carefully drawn class action rule could drastically change the litigation climate in Mississippi. The reforms suggested in this article may not completely eradicate Mississippi's status as "lawsuit central." They would, however, contribute to eliminating Mississippi's unfavorable business reputation, return a sense of fairness to the state's judicial system, and increase the state's chances of creating and attracting more and better jobs for all Mississippians.

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seller's immunity on the existence of a manufacturer as a defendant in the lawsuit.

[156] Ballard, *supra* note 1; Pear, *supra* note 1.

MISSISSIPPI'S CIVIL JUSTICE SYSTEM: PROBLEMS, OPPORTUNITIES AND SOME SUGGESTED REPAIRS

Sherman Joyce[*]
Michael Hotra[**]

In his book, *The Most Southern Place on Earth: The Mississippi Delta and the Roots of Regional Identity*, author James Cobb observed that the cultural conditions in Mississippi and the Mississippi Delta intensified the twentieth century conflicts of race, class and economics that played out on a national canvas.[1] Like the cultural trends underscored in Cobb's book, the current litigation environment in Mississippi's courtrooms is emblematic of problems that the American Tort Reform Association (ATRA) has witnessed in state civil justice systems across the nation.[2]

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[1] *See* JAMES C. COBB, THE MOST SOUTHERN PLACE ON EARTH: THE MISSISSIPPI DELTA AND THE ROOTS OF REGIONAL IDENTITY 333 (1992).

[2] ATRA, founded in 1986 and based in Washington, D.C., is a coalition of more than 300 businesses, corporations, municipalities, associations and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance and predictability in the civil justice system through public education and the enactment of state legislation.

ATRA is not alone in identifying the negative effects of the current litigation trends in Mississippi. Recently, the condition of Mississippi's civil justice system has attracted heightened attention from both in-state and out-of-state media outlets.[3] The reason is that Mississippi is viewed across the nation as a gold mine for plaintiffs—a state where verdicts in favor of plaintiffs are frequent and are often very large. Through our participation in this symposium, ATRA seeks to publicly examine how Mississippi gained its unfavorable reputation as a lawsuit "mecca"[4] and to suggest changes that could be made by the courts and Legislature in Mississippi to halt the proliferation of lawsuits in the state and encourage economic growth.

I. OVERVIEW

Since 1995, Mississippi's civil justice system has seen a sharp escalation in large jury verdicts[5] and the migration of mass actions—particularly in the pharmaceutical area—into some of Mississippi's most impoverished and rural counties.[6] Personal injury lawyers from neighboring states such as Alabama and Texas, sensing great opportunities, are now taking

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ATRA recently completed a study of the most unfair state court forums in the United States—three Mississippi counties made the list (Claiborne, Copiah and Jefferson). *See* American Tort Reform Association, *Bringing Justice to Judicial Hellholes 2002*, *available at* http://www.atra.org/reports/hellholes (last visited Oct. 4, 2002).

[3] Beginning with an article in the April 30, 2001, edition of *The National Law Journal*, aspects of Mississippi's civil justice system received coverage in the national media and at least nine local or regional Mississippi newspapers. *See, e.g.*, Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 30, 2001, at A1; Betty Liu, *The Poor Southern County That's Big on Lawsuits*, FIN. TIMES, Aug. 20, 2001, at 5, *available at* 2001 WL 25578228; Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at A1; Robert Pear, *Mississippi Gaining As Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1, *available at* 2001 WL 26417393; *Fox News Live: Civil Lawsuits in Jefferson County* (Fox News television broadcast, June 3, 2001).

[4] Ballard, *supra* note 3; Pear, *supra* note 3; *see also* Arnold v. State Farm Fire & Cas. Co., 277 F.3d 772, 774 (5th Cir. 2001) (stating that Mississippi courts "have become a mecca for plaintiffs' claims.").

[5] *See* Mitchell, *supra* note 3.

[6] *See id.*

the Mississippi bar and bringing their cases in Mississippi courts.[7]

More troubling than these symptoms of problems with Mississippi's civil justice system, however, have been the effects on the state's residents. For example, the local physician or pharmacist is often joined in mass tort lawsuits simply to keep the case in a pro-plaintiff county court.[8] The cost of these lawsuits on local health care professionals, in turn, impacts the cost and accessibility of health care for Mississippians.[9]

The Bankston Drug Store in Fayette, Mississippi, has witnessed first-hand the effects of Mississippi's liberal procedural rules, which allow numerous cases from around the country to be aggregated together and brought in a single forum.[10] As the sole pharmacy in Fayette, the seat of pro-plaintiff Jefferson County, the Bankston Drug Store has been frequently named as a defendant in massive product liability actions in which the principal targets are pharmaceutical manufacturers.[11] In 2000 alone, the pharmacy was sued six times.[12] The Bankston Drug Store's owner, pharmacist Traci Swilley, has said: "My lawyers tell me that we're only sued because they want to stay in Jefferson County because the verdicts are so high."[13]

Ms. Swilley chose to forego employment in a chain drug store for a more peaceful existence as a small town pharmacist, but unfortunately, the civil justice system in Mississippi is preventing her from having the peaceful life that she sought.[14] In addition to spending a substantial portion of her time complying with litigation-related requests for documents, Ms. Swilley's liability coverage—which she is required by law to have—has been dropped by one insurer and a second increased her rate by $1000 annually.[15]

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[7] *See* Ballard, *supra* note 3.

[8] *See* Beverly Pettigrew Kraft, *Pharmacies Often in the Middle*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at A16.

[9] *See id.*

[10] *See* Ballard, *supra* note 3; Kraft, *supra* note 8.

[11] *See* Ballard, *supra* note 3; Kraft, *supra* note 8. The former owner of the Bankston Drug Store, Ms. Hilda Bankston, has been named as a defendant in so many lawsuits that she has lost count of the number of cases in which she has been involved. *See NBC Nightly News* (NBC television broadcast, Sept. 1, 2002).

[12] *See* Mitchell, *supra* note 3.

[13] Ballard, *supra* note 3.

[14] *Id.*

For both large and small businesses, the message is clear: Get out of Mississippi, and stay out of Mississippi. One multinational corporation has gone bankrupt due in part to a Mississippi jury's $500 million judgment—a judgment so large that the defendant could scarcely afford to post a bond to appeal the judgment.[16] The judgment in that case stemmed from a $4 million contract dispute.[17] Businesses seem to be hearing the message that Mississippi juries are sending; to date, at least forty-four insurance companies have left the state.[18]

Another problem in the Mississippi civil justice system is the Attorney General's "innovative" use of the legal system to achieve public policy goals. With his ground-breaking lawsuit against the tobacco industry, Mississippi Attorney General Mike Moore, with the assistance of private outside counsel, pioneered a litigation model in which state attorneys general, personal injury lawyers and the courts—not legislators or governors—assume a quasi-regulatory role in shaping public policy. As this article will discuss, this model runs counter to the traditional notion of the separation of powers inherent in a three-branch government. It burdens Mississippi's civil justice system, slowing access to the courts for plaintiffs with legitimate claims and defendants seeking to vindicate their rights. Moreover, allowing the courts and private actors to assume a quasi-regulatory role is a poor manner in which to shape public policy.

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[15] *See* Kraft, *supra* note 8. Swilley declined to disclose the actual cost of her coverage. *Id.*

[16] *See* O'Keefe v. Loewen Group, Inc., No. 91-67-423 (Cir. Ct. Hinds County, Miss. 1995); Michael I. Krauss, *NAFTA Meets the American Torts Process:* O'Keefe v. Loewen, 9 GEO. MASON L. REV. 69, 83-86 (2000).

[17] *O'Keefe*, No. 91-67-423; *see* Krauss, *supra* note 16, at 83-86.

[18] *See* Jimmie Gates, *Consumers Real Losers, Broker Says*, CLARION-LEDGER (Jackson, Miss.), June 20, 2001, at A1.

While the problems with Mississippi's civil justice system are serious, they are not insurmountable. ATRA believes that the four reforms discussed below, which would reign in punitive damages, require open and competitive bidding for government contracts, provide fairness in litigation for nongovernmental plaintiffs, and address the crisis over medical liabilities faced by physicians, would help remedy the current problems in Mississippi's civil justice system.

II. "OUTLIER" PUNITIVE DAMAGES VERDICTS

Extremely high punitive damage verdicts and the frequency with which they are awarded are perhaps the most conspicuous symptoms of problems with Mississippi's civil justice system.

Prior to 1995, there were no Mississippi verdicts that exceeded $9 million.[19] Since that time, however, there have been nineteen such verdicts—seven for at least $100 million.[20] In one case, a Mississippi trial court jury returned a verdict in which actual damages of $22,193 were accompanied by a punitive damage award of $33 million.[21] In another case, a jury awarded $30 million in punitive damages in an insurance policy dispute in which the compensatory damages were $250,000.[22] Outcomes such as these may well have been what the United States Supreme Court had in mind when it declared that punitive damages have "run wild" in this country.[23]

While opponents of punitive damages reform may assert that these nineteen verdicts in excess of $9 million are only a small percentage of the approximately 74,000 annual civil filings in Mississippi courts,[24] these large verdicts have a

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[19] *See* Mitchell, *supra* note 3.

[20] *See id.*; Melody Peterson, *Jury Levies $100 Million Award Against Heartburn Drug Maker*, N.Y. TIMES, Sept. 30, 2001, at A32, *available at* 2001 WL 28007782.

[21] *See* Deborah Lohse, *Insurer Is Told by Jury to Pay $32.5 Million*, WALL ST. J., Aug. 24, 1999, at B10, *available at* 1999 WL-WSJ 24911021.

[22] *See Hinds Jury Awards $30 Million Verdict Against Insurnace Company*, ASSOC. PRESS NEWSWIRE, May 31,2002, *available at* WL MSNEWS file.

[23] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

[24] *See* EXAMINING THE WORK OF THE STATE COURTS, 1999-2000, A NATIONAL

"shadow of the gallows" effect on the vast majority of cases that settle before going to trial. As Yale Law School Professor George Priest has observed, "the availability of unlimited punitive damages affects 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damage claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation."[25]

These concerns are not merely academic. The unpredictable nature of punitive damages compelled Winnebago Industries' general counsel to observe that from his perspective, "the absolute unknown is punitive damages. In states like Mississippi, Alabama and Texas, even if there's a 95 percent chance of prevailing, you're afraid to roll the dice. When one award could be half your company's net worth, those dice can get pretty heavy."[26]

Mississippi, recognizing that punitive damages are different from other damages awarded in a case, has enacted a statute that requires plaintiffs to meet a higher burden of proof for punitive damages than is generally required in ordinary civil cases.[27] The current burden of proof for the imposition of punitive damages reflects the quasi-criminal nature of punitive damages. That is, by requiring plaintiffs to show wrongdoing by "clear and convincing" evidence as a predicate to obtaining punitive damages, Mississippi law takes the middle ground between the ordinary standard in civil cases (i.e., a "preponderance of the evidence") and the standard required in criminal cases (i.e., "proof beyond a reasonable doubt").[28]

While this is a positive first step, ATRA advocates a more comprehensive approach to reigning in punitive damages.

PERSPECTIVE FROM THE COURT STATISTICS PROJECT 18 (Brian Ostrom et al., eds. 2001).

[25] George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996). Professor Priest's figures are based on a study of punitive damages in Alabama, but as he points out in his article, "there is no reason to believe that the phenomenon is unique to Alabama." *Id.* at 825.

[26] Michael Hotra, *There's Trouble in Forest City*, FYI (Am. Legis. Exchange Council, Washington, D.C.), Apr. 25, 1997, at 10.

[27] *See* MISS. CODE ANN. § 11-1-65(1) (Supp. 2001).

[28] *See id.* § 11-1-65(1)(a).

Specifically, ATRA advocates establishing a trigger for punitive damages that reflects the intentional tort origins of punitive damages awards and requiring proportionality so that punitive damages fit the offense for which they are awarded.

Punitive damages should only be awarded in cases where the plaintiff can demonstrate that the defendant's conduct exhibited actual malice. Mississippi's current statute limits punitive damages to instances where the plaintiff can show "actual malice, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or . . . actual fraud."[29] Although two of the triggers in the statute, actual malice and fraud, require a showing of intentional conduct, the statute is worded so that a plaintiff may also receive punitive damages by meeting the lower standard of showing that a defendant acted with "gross negligence which evidences . . . reckless disregard" for safety.[30] The difficulty with the "reckless disregard" trigger is that it does not require a showing of intentional conduct, and it may be less clear to juries when punitive damages should be awarded under this standard. The difference between intentional conduct and unintentional conduct is a distinction with which the average juror is likely to be familiar. The blurry line between "negligence" and "gross negligence" is one reason why ATRA supports adoption of an "actual malice" standard for the recovery of punitive damages. This trigger draws a bright line for juries and, moreover, reflects the roots of punitive damages law. Historically, punitive damages were reserved for clearly intentional torts such as assault, battery, trespass and false imprisonment.[31] Although in recent times punitive damages have been imposed for unintentional conduct, we believe that a return to the intentional conduct requirement would represent a better approach to awarding punitive damages.

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[29] *Id.*

[30] *Id.*

[31] *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Punitive Damages Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1013 (1999).

In addition to the actual malice standard, reasonable parameters should be put on punitive damages awards to make the punishment fit the offense. Proportionality has been an important part of the United States Supreme Court's consideration of the validity of criminal punishment.[32] Even very serious crimes such as larceny, robbery and arson have sentences defined with a maximum set forth in a statute. Similarly, there should be an upper limit on the civil damages that can be imposed on defendants through punitive damages.

Mississippi would not be the first state to limit punitive damages in relation to compensatory damages; a number of states have already enacted similar laws.[33] ATRA proposes permitting punitive damages awards against larger businesses up to the greater of two times the amount awarded to the claimant for economic and noneconomic losses, or $250,000.[34] ATRA also supports limiting the maximum single punishment against small businesses to two times the amount awarded to the claimant for economic and noneconomic losses, or $250,000, whichever is less (i.e., $250,000 would be the maximum). ATRA supports a lower limit for small business because, as a practical matter, a punitive damages award exceeding $250,000 would force most small businesses into bankruptcy. Such a law, consistent with the holdings of the United States Supreme Court[35] and with notions of just punishment, would serve the deterrent and penal purposes of punitive damages awards, while placing a rational limit on the punishment based on the underlying harm.

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[32] *See id.*

[33] *See, e.g.*, ALASKA STAT. § 9.17.020(f)-(h) (Michie 2000); FLA. STAT. ANN. § 768.73 (West 2000); IND. CODE ANN. § 34-51-3-4 (Michie 1998); NEV. REV. STAT. ANN. § 42.005 (Michie 1996); N.J. STAT. ANN. § 2A:15-5.14 (2000); N.C. GEN. STAT. § 1D-25 (1999); N.D. CENT. CODE § 32-3.2-11(4) (1996 & Supp. 2001); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2002).

[34] The definition of a "large business" and a "small business" is, of course, something that could be determined during the legislative process. We suggest following Alabama's example and defining "small businesses" as those with a net worth of less than $2 million and "large business" as those with a net worth greater than $2 million. *See* ALA. CODE § 6-11-21 (1993 & Supp. 2000).

[35] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

III. CAPPING APPEAL BONDS

Until recently, defendants in Mississippi were pressured to settle even questionable claims due to the very real possibility that companies would be on the receiving end of a jury verdict so large they could not afford to post the 125% bond necessary for an appeal.[36] The case of *O'Keefe v. Loewen Group, Inc.* demonstrates the problems that a defendant faces when a jury returns a verdict that is so large it cannot afford to post a bond for appeal.[37] Loewen, a Canadian corporation that owned chains of funeral homes, was forced into bankruptcy due in large part to its inability to post a the $625 million necessary to appeal a $500 million Mississippi verdict arising from a $4 million contract dispute.[38] As one Mississippi practitioner observed,

> The *Lowen* [sic] decision confirmed that the effective power to change state law rests not in the hands of any elected state officials, but in locally elected trial judges and the juries they empanel. Any judgement that cannot be appealed because it cannot be bonded is law of the most immediate character.[39]

The Mississippi Supreme Court's recent amendment to the rule covering appeal bonds may be a step in the direction of correcting the past problems with appeal bonds.[40] The rule provides that "[a]bsent unusual circumstances, the total amount of the required bond or equivalent security for any case as to punitive damages shall not exceed $100 million."[41] The problem with this rule is that neither the language of the statute nor the advisory committee notes define what constitutes an "unusual circumstance." Thus, ATRA would welcome more guidance from the Mississippi Supreme Court in defining "unusual circumstances," so that the court's intentions in amending the rule may be implemented by trial courts.

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[36] *See* MISS. R. APP. P. 8(a) ("The appellant shall be entitled to a stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond . . . of 125 percent of the amount of the judgment appealed.").

[37] O'Keefe v. Loewen Group, Inc., No. 91-67-423 (Cir. Ct. Hinds County, Miss. 1995); *see* Krauss, *supra* note 16, at 84-86.

[38] *O'Keefe*, No. 91-67-423; *see* Krauss, *supra* note 16, at 84-86. Plaintiff's counsel, Willie Gary took the unique step, during the *O'Keefe* trial, of taking out full page color advertisements in local newspapers with the American and Mississippi flags on one side with the word "yes" next to his client's name and the Canadian and Japanese flags with the word "No" next to Loewen's name. *Id.* at 77.

[39] CENTER FOR LEGAL POLICY AT THE MANHATTAN INSTITUTE, REGULATION BY LITIGATION: THE NEW WAVE OF GOVERNMENT SPONSORED LITIGATION CONFERENCE PROCEEDINGS 9 (June 22, 1999) [hereinafter REGULATION BY LITIGATION] (Remarks of Michael Wallace), *available at* http://www.manhattan-institute.org/html/mics_1_a.htm.

[40] *See* MISS. R. APP. P. 8(b)(2)(c).

IV. REGULATION THROUGH LITIGATION[42]

In 1994, Mississippi Attorney General Mike Moore filed a lawsuit in Jackson County Court against the manufacturers of cigarettes and their related trade and professional associations.[43] Mississippi's lawsuit asserted a novel cause of action; it alleged that the State enjoyed an independent right of recovery under a theory of "unjust enrichment," since the tobacco industry allegedly had externalized costs and benefitted from money that the State had allegedly spent treating tobacco-related illnesses.[44] The Mississippi lawsuit, and similar lawsuits in other states, altered a fundamental principle of tort law by circumventing the doctrine of subrogation. In tort law, the cause of action belongs to the injured party; if another party brings a cause of action on the injured party's behalf, the litigating party only has the same rights and remedies as the injured party would have. In the state attorneys general tobacco lawsuits, however, the states claimed that they should have greater legal rights than the individual plaintiffs would have had.[45] By asserting this new cause of action that bypassed the evidentiary hurdles present in a subrogation claim, the State of Mississippi was no longer required to demonstrate that tobacco had in fact caused a certain disease in a particular smoker.[46] Similarly, Mississippi was not subject to the assumption-of-risk defense, which had been successfully asserted by the tobacco industry in claims brought by injured smokers.[47] With the hurdles of causation and the assumption-of-risk defense out of the way, Mississippi and other states were able to strong-arm the tobacco industry into a massive and unprecedented settlement.

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[41] *Id.*

[42] This term was coined by former Clinton Administration Secretary of Labor Robert Reich, who asserted in an op-ed in *USA Today* that "[t]he era of big government may be over, but the era of regulation through litigation has just begun." Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at 15A, *available at* http://www.pqasb.pqarchiver.com/USAToday/.

[43] *See* Moore v. Am. Tobacco Co., No. 94-1429 (Ch. Ct. Jefferson County, Miss. May 23, 1994).

[44] *See id.*

[45] *See* Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do to Stop It*, NAT'L LEGAL CENTER FOR THE PUB.

Assisting Attorney General Moore in this action was well-known Pascagoula personal injury lawyer Richard Scruggs, who entered into an informal understanding with Attorney General Moore that, in exchange for his assistance in the state's case, if successful, the state would petition the tobacco industry to pay Mr. Scruggs' fees.[48] By enlisting Mr. Scruggs in its effort, Attorney General Moore's office was able to fund a lawsuit that promised to be risky, time consuming and expensive without seeking additional funds from the state Legislature.[49]

Ultimately, after being sued by nearly every state, the tobacco industry entered into a forty-six state master settlement agreement. The details of the state lawsuits against the tobacco industry as well as the subsequent settlement of those cases have been well-documented in the media, popular culture and in the legal scholarship.[50]

INTEREST, Nov. 1999.

[46] *See id.*

[47] *See id.*

[48] *See* REGULATION BY LITIGATION, *supra* note 39, at 40 (remarks of Richard Scruggs).

[49] *See id.* (remarks of Michael Wallace).

[50] *See, e.g.*, Richard C. Ausness, *Paying for the Health Costs of Smoking: Loss Shifting and Loss Bearing*, 27 SW. U. L. REV. 537, 543-47 (1998) (detailing several tobacco lawsuits); Richard Scruggs, *Tobacco Litigation: A Problem That Needs a Solution*, 41 N.Y.L. SCH. L. REV. 487, 491 (1999) (discussing recent decisions that resulted in class action vehicle for suits no longer available); Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 467 (2000) (discussing increasing state tobacco litigation); Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 22, 24 (discussing current lawsuits as they pertain to certain industries); Robert A. Levy, *The Great Tobacco*

The legacy of Mississippi's tobacco lawsuit, from ATRA's perspective, has less to do with smoking control and public health than with the two precedent-setting public policy maneuvers in the litigation. First, the tobacco litigation produced a powerful alliance between public officials and private attorneys. This process provided powerful financial incentives for both the state and personal injury lawyers to bring similar claims in the future. Post-litigation analysis reveals that the monies received in the state attorneys general tobacco litigation have not been used for smoking-related programs but rather have been used to fill state coffers wherever money is needed. According to a report released in 2001 by the National Conference of State Legislators, only five percent of state tobacco settlement revenue has been used by the states for tobacco use prevention programs.[51] Instead, more than one dollar in four is used for "endowments and budget reserves."[52] North Dakota used a share of its revenue for flood control, while the governor of Connecticut favored using his state's funds to lower property taxes and purchase school computers.[53] The use of funds by states and cities for general budgetary concerns suggests that this litigation model will be repeated in the future to subsidize state budgets as needed.[54]

The second legacy of the state attorneys general tobacco litigation is the idea of using the courts to set public policy.[55]

Robbery, LEGAL TIMES, Feb. 1, 1999, at 27; Barbara Olson, *Legislating by Litigating*, WASH. TIMES, May 13, 1999, at A21, *available at* http://washingtontimes.com/archives.htm; David Rubenstien, *Lessons Learned from the Tobacco Wars, the Rules Have Changed*, CORP. LEGAL TIMES, July 1999, at 43; THE INSIDER (Touchstone Pictures 1999) (making a cameo appearance is Mississippi Attorney General Mike Moore).

[51] Press Release, National Conference of State Legislators, Health Programs Benefit from Tobacco Settlement (August 11, 2001), *available at* http://www.ncsl.org/programs/press/2001/pr010811.htm.

[52] *Id.*

[53] *See* Saundra Torry, *Anti-Smoking Efforts Getting Little from Deal*, WASH. POST, Apr. 28, 1999, at A3, *available at* 1999 WL 16999806.

[54] *See generally* Richard L. Cupp, Jr., *Paint Plaintiffs As Pirates*, NAT'L L.J., Aug. 20, 2001, at A24.

[55] *See* Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1356-58 (2001) (discussing innovative litigation tactics used by plaintiffs).

Faced with what they perceive to be unsatisfactory delays in a legislative process allegedly controlled by "special interests," legal scholars and plaintiffs' lawyers are increasingly advocating the use of the courts—based on the tobacco litigation model—to advance public policy goals. Commenting on city lawsuits against the manufacturers of firearms, Harvard Law School Professor Laurence Tribe wrote that, "the more natural and democratic alternative of getting the legislature to do something seems to be ruled out by the lobby power of the industry."[56] When asked by *Time* magazine whether lawyers were running America, Richard Scruggs famously replied, "Somebody's got to do it."[57] Other plaintiffs' lawyers have echoed Mr. Scruggs' sentiments. Washington, D.C. plaintiffs' lawyer John Coale has stated that "[t]he legislature has failed," while Wendell Gauthier, a plaintiffs' lawyer from New Orleans once stated that "the legislatures need [the trial lawyers'] help."[58]

Their view can be defined simply: the public policy ends justify the non-democratic means.[59] When this litigation model is employed, private attorneys working with attorneys general set public policy with virtually no public accountability. This litigation model circumvents state legislatures and violates our system of separate but coequal branches of government.

A. Public Litigation for Private Profit

The partnership between private attorneys and state attorneys general has proven very profitable for the attorneys with enough luck, or political connections, to enter into these agreements. It is estimated that the lawyers in private practice who represented the states in the state attorneys general tobacco litigation earned or stand to earn at least $8.6 billion in fees from tobacco lawsuits settled in just four states.[60]

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[56] Ellen Goodman, *The Gun Fight*, WASH. POST, Feb. 27, 1999, at A21.

[57] Cohen, *supra* note 50, at 24.

[58] Patrick E. Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails,* N.Y. TIMES, Mar. 10, 1999, at A1.

[59] *See* Reich, *supra* note 42. Former Secretary Reich subsequently amended his earlier endorsement of regulation through litigation, stating that "[t]he strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22, *available at* 2000 WL-WSJ 3013604.

Unfortunately, in many states the process by which outside counsel were selected appears to have been a political patronage system. Kansas Attorney General Carla Stovall, after selecting one in-state law firm with extensive experience in tobacco litigation to represent her state, later rescinded the offer and selected another firm—the firm at which she practiced law prior to becoming attorney general.[61] Former Texas Attorney General Dan Morales received at least $150,000 in political contributions from the five attorneys he hired to manage the state's lawsuit against the tobacco industry.[62] Attorney General Morales's actions became the target of an investigation by his successor, Attorney General John Cornyn.[63] In Arkansas, Attorney General Mark Pryor investigated allegations that his predecessor's (Attorney General Winston Bryant) name was forged on a contract with outside counsel in the state's tobacco lawsuit.[64]

In the final forty-six-state tobacco master settlement agreement, payment of outside counsel was to be made by arbitration panels over approximately twenty-five years. Many counsel, however, issued bonds to receive their funds "upfront."[65] This new infusion of capital gave a handful of personal injury lawyers and law firms a war chest to bring similar actions against other industries.

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[60] *See* REGULATION BY LITIGATION, *supra* note 39, at 41 (remarks of John Langbein).

[61] *See* JOHN FUND & MARTIN MORSE WOOSTER, THE DANGERS OF REGULATION THROUGH LITIGATION: THE ALLIANCE OF PLAINTIFFS' LAWYERS AND STATE GOVERNMENTS 14 (Am. Tort Reform Found. 2000).

[62] *See Faust in Texas*, WALL ST. J., June 16, 1999, at A26, *available at* 1999 WL-WSJ 5456576.

[63] *See* REGULATION BY LITIGATION *supra* note 39, at 35 (remarks of Texas Attorney General John Cornyn).

[64] *See* FUND & WOOSTER, *supra* note 61, at 22, 23.

[65] Thomas B. Edsall, *Lawyers Get Tobacco Fees Early*, WASH. POST, Feb. 14, 2001, at A14, *available at* 2001 WL 2543714.

Using private attorneys to represent the state is not a practice that ATRA advocates. As one commentator pointed out,

> In a free society, we simply cannot condone private lawyers using the sword of the state to enforce public law—with an incentive to increase the penalties. As the Supreme Court cautioned more than 60 years ago in *Berger v. United States*, 295 U.S. 78 (1935), an attorney for the state "is a representative not of an ordinary party to a controversy, but a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all."[66]

If attorneys general are going to contract with private firms, however, the contracts should be made through a process of open and competitive bidding.[67]

B. Regulation by Litigation: Should the Judicial Branch Be First Among Equals?

In addition to placing a profit motive behind public law enforcement duties, regulating entire industries through the courts is antithetical to the separation of powers inherent in our three-branch government. United States Supreme Court Justice Antonin Scalia has explained the origin and importance of the separation of powers doctrine in American law:

> It is the proud boast of our democracy that we have a "government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX of the Massachusetts Constitution of 1780, which reads in full as follows:
>
> > In the Government of this Commonwealth, the Legislative Department shall never exercise the Executive and Judicial powers, or either of them; The Executive shall never exercise the Legislative and Judicial powers, or either of them; The Judicial shall never exercise the

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[66] Levy, *supra* note 50, at 27.

[67] Mark A. Behrens & Donald Kochan, *Let the Sunshine In: The Need for Open, Competitive Bidding in Government Retention of Private Legal Services*, 28 PROD. SAFETY & LIAB. RPTR. (BNA) No. 38, at 915 (Oct. 2, 2000).

> Legislative and Executive Powers, or either of them . . . .to the end that it may be a government of laws and not of men.[68]

Alabama Attorney General Bill Pryor, an outspoken critic of regulation through litigation, has condemned regulation by litigation as a violation of the separation of powers. He has written:

> The framers of the federal Constitution also viewed separation of powers as the central guarantee of a just government. The recent government suits against the tobacco and firearm industries trample upon this central feature of the rule of law. The aim of this litigation is to shift the awesome powers of legislative bodies—powers to control commercial regulation, taxation, and appropriation—to the judicial branch of government.[69]

Despite criticisms of this practice, plaintiffs' attorneys are very honest about their intention to set public policy through the courts. In 1999, before filing suit against several health insurers, Richard Scruggs met with Wall Street analysts to notify them of his intent.[70] Unlike the state tobacco litigation, Mr. Scruggs was not representing any government entity in these lawsuits. His stated goal, to "rewrite the rules of American health care,"[71] was foremost a public policy objective, and one he sought to advance through the courts, where he stands to collect a large contingent fee if he is successful, rather than through the legislative process.

Within days of his announcement, the market capitalization of the companies Mr. Scruggs referenced as targets of his litigation fell by $12 billion.[72] The message of that decline in shareholder value was clear: Wall Street recognizes that personal injury lawyers now have the capital and the legal resources to bring down entire industries. Mr. Scruggs' lawsuits against the managed care companies continues. Mr. Scruggs has pledged that it will go on if Congress passes a comprehensive Patient's Bill of Rights law that is not to his liking.[73]

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[68] Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[69] REGULATION BY LITIGATION, *supra* note 39, at 2 (remarks of Alabama Attorney General Bill Pryor).

[70] *See* David Segal, *Tag Team Lawyers Make Businesses Blink*, WASH. POST, Nov. 12, 1999, at A1, *available at* 1999 WL 23314332.

[71] Cohen, *supra* note 50.

[72] *See* Segal, *supra* note 70.

Mississippi, in particular, is being targeted as a jurisdiction in which private attorneys can bring lawsuits to achieve their public policy goals. In August 2001, the *New York Times* speculated that rural Mississippi trial courts with their reputation for large jury verdicts are fostering a "gold rush" litigation mentality and would be a likely candidate for the first state lawsuits against health care insurers, should Congress pass a Patient's Bill of Rights law permitting managed care companies to be sued in state court.[74] More than a year earlier, Mr. Scruggs predicted much the same result: "One of these days, one of the industry's lawyers in someplace like Jefferson County, Mississippi, is going to call headquarters and say, 'This jury just returned a $1 billion verdict.' Just think what that will do to the company's stock."[75]

C. Expanding the Tobacco Litigation Model

While the state tobacco lawsuits were initially portrayed as a unique situation, evidence now indicates that the tobacco experience may serve as a model for trial attorneys and attorneys general to go after other industries.[76] The first "regulation through litigation" lawsuits to follow the tobacco suits were brought by urban mayors—assisted by private outside counsel retained on a contingent fee basis—alleging that firearms manufacturers had been negligent in the marketing and distribution of their products, and that handgun sales represent a public nuisance. These lawsuits seek, among other things, to recoup the law enforcement and emergency room costs that cities allegedly have spent preventing and treating gun-related violence.[77] The list may not stop there. Part of the 1998 tobacco Master Settlement Agreement included a payment of $50 million into an enforcement fund to be used by the National Association of Attorneys General.[78] While this payment might not be used to fund litigation against other industries, it provides a strong incentive for state attorneys general to attempt to repeat their success with the tobacco settlement. In fact, in June of 1999, fifty state attorneys general held a strategy session to discuss future targets.[79] "Reports suggest that these targets could include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, 'Hollywood,' video game makers, and even the dairy and fast food industries."[80] The entrepreneurial spirit of some government officials is probably best illustrated by an August 27, 1999, letter from Rhode Island Attorney General Sheldon Whitehouse to other state attorneys general suggesting that they should "go after" the latex glove industry to put a "couple of billion" dollars in a fund to compensate persons who were allegedly latex-allergic.[81] To date, Attorney General Whitehouse has found no takers for suing on behalf of the latex-allergic. Since circulating his "brainstorm" letter, however, Attorney General Whitehouse has entered into a contingent fee contract with the law firm of Ness, Motley, Loadholdt, Richardson and Poole to sue the one-time makers of lead-based paint.[82] It is estimated that the Ness Motley firm earned more than $1 billion for its work in the state tobacco litigation.[83] Other lead paint lawsuits have been filed by the cities of Milwaukee, Wisconsin, San Francisco and Oakland, California, and St. Louis, Missouri.[84]

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[73] *See* Jimmie Gates, *Lawyer: HMOs Still in Hot Seat*, CLARION-LEDGER (Jackson, Miss.), Aug. 12, 2001, at B1.

[74] *See* Pear, *supra* note 3.

[75] Cohen, *supra* note 50.

[76] *See* Ed Dawson, Note, *Legigation*, 79 TEX. L. REV. 1727, 1729 (2001) (stating tobacco cases are beginnings of dangerous trend to subject industries to regulation through threats of litigation); *see also* Sandra L. Gravanti, Note, *Tobacco Litigation: United States Versus Big Tobacco–An Unfiltered Attack on the Industry*, 52 FLA. L. REV. 671, 691 (2000) (discussing lawsuits as tactic to control industries).

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[77] As of August 18, 2001, at least thirty-four states, cities and municipalities have filed suits against firearm manufacturers. At least eight of these cases have been dismissed at the trial court level. *See generally* Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515 (2000).

[78] *See* Samuel Goldreich, *Small Farmers Stand Against Big Tobacco's Settlement; $246 Billion Deal Burns Independent Growers*, WASH. TIMES, Apr. 26, 1999, at D11, *available at* 1999 WL 3083713.

[79] *See* Mark Curriden, *Fresh Off Tobacco Success, State AGs Seek Next Battle: United Front Puts Businesses on the Defensive*, DALLAS MORNING NEWS, July 10, 1999, at 1A, *available at* 1999 WL 21808585.

[80] Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 258 (2000).

[81] *See* Letter from Rhode Island Attorney General Sheldon Whitehouse to Idaho Attorney General Alan G. Lance (Aug. 27, 1999).

Similarly, in August, 2001, the Prescription Access Litigation group (PAL), a "coalition of private attorneys and public health officials" filed suit against Schering-Plough, maker of the prescription allergy medication Claritin, in New Jersey state court,[85] alleging fraud and claiming that the manufacturer overstated the product's effectiveness in direct-to-consumer advertising. PAL has openly stated that one of its goals in bringing suit is to influence public policy.[86]

The growth of lawsuits following the tobacco model suggests that unless the states take action to curb this trend, public and private attorneys will continue to try to use the courts to generate revenue and shape public policy.

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[82] State v. Lead Indus. Ass'n, No 99-5226 (Sup. Ct. Providence County, R.I. Apr. 2, 2001), *available at* 2001 WL 345830.

[83] *See Puff Daddies*, GEORGE, June, 1999, at 85.

[84] *See* Cupp, Jr., *supra* note 54; *see also* Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685, 691-94 (2000); Greg Borowski, *Council Oks Lead Paint Lawsuit*, MILWAUKEE J. & SENTINEL, Oct. 20, 2000, at B1, *available at* 2000 WL 26091009; Editorial, *It's All About Money*, ST. LOUIS POST-DISPATCH, Feb. 22, 2000, at B12, *available at* 2000 WL 3509632; Bill Murphy, *2 School Districts Sue Paint Makers/Houston, Spring Branch Seek Money to Treat Lead and Eliminate Hazards*, HOUSTON CHRON., July 7, 2000, at 21, *available at* 2000 WL 4309547; Norm Parish, *City's Lead Paint Suit Is Almost Identical to One in Rhode Island Team Handling That Case Was Rejected Here; Harmon Selected More Costly Firm*, ST. LOUIS POST-DISPATCH, Feb. 24, 2000, at B1, *available at* 2000 WL 3510082 (reporting that St. Louis complaint was nearly a duplicate of one filed by a legal team that the city rejected to handle the case; the work was given to a more expensive and less experienced attorney who contributed to the mayor's campaign fund); Scott Winokur, *S.F., Oakland Join Suit over Lead Paint/Redress Sought for Health Costs*, S.F. CHRON., Jan. 22, 2001, at B1, *available at* 2001 WL 3393006 (reporting that San Francisco and Oakland joining suit brought by Santa Clara County).

[85] *See* PRESCRIPTION ACCESS LITIGATION, CONSUMER GROUPS SUE OVER DIRECT-TO-CONSUMER ADVERTISING BY SCHERING PLOUGH, *at* http://www.prescriptionaccesslitigation.org/press-claritin-0801.htm.

[86] *See* Telephone Interview with Matthew L. Tuccillo of Lieff, Cabraser, Heimann & Bernstein, LLP, counsel to Prescription Access Litigation group (Aug. 28, 2001); PRESCRIPTION ACCESS LITIGATION, FREQUENTLY ASKED QUESTIONS CLARITIN LAWSUIT, http://www.prescription accesslitigation.org/faq.htm (last visited Oct. 8, 2002).

D. Some Solutions

1. Let the Sunshine In

Regulation through litigation challenges the established domains of each of the three branches of government and the doctrine of separation of powers. In Kansas, North Dakota, Texas and Virginia however, the legislative and executive branches of government have successfully reasserted their authority in the "regulation through litigation" debate. Each has passed laws requiring that the state's attorney general receive competitive bids for large contingent fee contracts with outside counsel and submit such contracts to the legislature for review.[87] Other states have also considered similar legislation.[88]

As the state legislator group, the American Legislative Exchange Council (ALEC), has noted in titling its model bill on this subject, "The Private Attorney Retention Sunshine Act," open and competitive bidding legislation holds the attorney general's hiring process up to the "sunshine" of public scrutiny and competition, and puts the legislature—the elected representatives of the people—on notice of the attorney general's intent. This notice can, in turn, serve as a touchstone for public discussion of the merits of any intended "regulation through litigation."

ATRA urges the Mississippi Legislature to consider enacting similar legislation.[89] While some attorneys general have argued against such laws,[90] Columbia Law School Professor John Coffee has observed, "There's not that much conceptual difference between a contract to build a new airport . . . and to hire a plaintiff's attorney."[91] Moreover, the Mississippi Supreme Court has noted that "[o]penness in government is the public policy of this state."[92] In retaining Richard Scruggs' law firm, however, Attorney General Moore delegated the hefty prosecutorial power of his office to a private citizen with no written contract. There was, instead, an "understanding" over how Mr. Scruggs was to be paid.[93] In addition to shedding light on the state's retention of outside counsel, the Sunshine Act could allow Mississippi to avoid the type of "misunderstandings" that have occurred in other states.[94]

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[87] *See* KAN. STAT. ANN. §§ 75-37,130 to 75-37,135 (2001); N.D. CENT. CODE § 54-12-08.1 (2001); TEX. GOV'T CODE ANN. § 404.097 (Vernon Supp. 2001); *id.* §§ 2254.100 to .109 (Vernon 2000); VA. H.B. 309 (signed by Gov. March 27, 2002).

[88] *See, e.g.*, S.B. 000-147, 62d Gen. Assem., 2d Reg. Sess. (Colo. 2000); H.B. 1202, 2000 Leg., Reg. Sess. (Md. 2000).

[89] *See* Behrens & Kochan, *supra* note 67.

[90] *See* Letter from Maryland Deputy Attorney General Donna Hill Stanton to Delegate John F. Wood, Jr., (Mar. 7, 2000).

2. Fairness in Litigation

Alabama Attorney General Bill Pryor observed that in the lawsuits Mississippi and the other states brought against the tobacco industry, the states claimed to have greater powers of recovery than those available to the ordinary citizen.[95] To correct this perceived imbalance, Attorney General Pryor has recommended, "a legislative ban on government suits against manufacturers for indirect harm, except for the traditional remedy of subrogation. If governments sue industries for harm primarily suffered by citizens, such as smokers, then the industry should be able to assert well-established defenses. . . ."[96]

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[91] Glen Justice, *In Tobacco Suit, Grumblings over Lawyer Fees*, PHILA. INQUIRER, Oct. 4, 1999, at A1.

[92] Mayor of Vicksburg v. Vicksburg Printing & Publ'g Co., 434 So. 2d 1333, 1336 (Miss. 1983).

[93] *See* REGULATION BY LITIGATION, *supra* note 39, at 40 (remarks of Richard Scruggs). According to Mr. Scruggs, "In the state of Mississippi, there was no contingency fee contract. There was no lawyers' arrangement. There was instead, an understanding: if the litigation proved successful, we would ask the court to extract an attorneys' fee from the losing party, the tobacco industry." *Id.*

[94] *See* Behrens & Kochan, *supra* note 67, at 917-18. In Maryland, for example, the agreement between the attorney general and contingency fee attorney Peter Angelos has led to dispute regarding the amount of Mr. Angelos' fee. *See, e.g.*, Daniel LeDuc, *Maryland Sues Angelos over Fees, Tobacco Money at Issue in Case*, WASH. POST, Dec. 9, 1999, at B1, *available at* 1999 WL 30307387.

[95] *See* William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1900-01, 1906 (2000); William H. Pryor, Jr., *Remarks of Attorney General Bill Pryor at Cumberland School of Law*, 29 CUMB. L. REV. 569, 567-75 (1999); William H. Pryor, Jr. et al., *Report of the Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions*, 27 CUMB. L. REV. 577, 581-83 (1996); William H. Pryor, Jr., Comment, *State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers*, 31 SETON HALL L. REV. 604, 604-06 (2001).

Toward that end, during the 106th session of the United States Congress, Senator Mitch McConnell (R-KY) and Representative Roger Wicker (R-MS) introduced Senate Bill 1269 and House Bill 2597, respectively. These identical companion bills, entitled the "Litigation Fairness Act of 1999," provided that:

> In any civil action in which the United States, or any State that accepts Federal funds, seeks to recover directly from any defendant, to the extent permitted by applicable Federal or State law, any benefits or services the United States or such State has provided or paid for or is obligated directly or indirectly to provide or pay for on behalf of another person, the United States or such State shall be subject to the same procedural rules and substantive law (including notification requirements, limitations, and affirmative defenses) that would apply to a claim brought against such defendant by the person on whose behalf the benefits or services were provided or paid or are obligated to be provided or paid.[97]

In addition to protecting targeted industries from entrepreneurial attorneys general intent asserting novel theories of liability and recovery, the Litigation Fairness Act ensures that the claims of injured individuals are placed on an equal footing with those of state and local governments.[98]

While the distinction may seem to be a legal technicality, the point is that governments should not have a stronger claim to recover for an individual's injuries than the individual would have if he or she filed suit.[99] Consider the example of Davis

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[96] REGULATION BY LITIGATION, *supra* note 39, at 5 (remarks of Alabama Attorney General Bill Pryor).

[97] S. 1269, 106th Cong. § 3 (1999); H.R. 2597, 106th Cong. (1999).

[98] *See* Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 595 (2001); *see also* Christopher Schroeder, *The Multistate Settlement Agreement and the Problem of Social Regulation Beyond the Power of State Government*, 31 SETON HALL L. REV. 612, 612-14 (2001).

[99] *See* Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort*

Industries, a manufacturer of inexpensive handguns that was forced into bankruptcy by the cost of defending a deluge of state and municipal lawsuits.[100] Now that it is bankrupt, plaintiffs with legitimate product liability claims may not receive compensation from the company.

V. MISSISSIPPI'S CRISIS IN MEDICAL LIABILITY

While the delivery of quality, affordable health care to Mississippians is by no means a new problem, the state's current crisis in medical liability threatens to exacerbate Mississippi's already-serious health care challenges.[101] According to recent reports, from 1999-2000, the number of malpractice lawsuits faced by Mississippi physicians increased 24%, with an additional 23% increase in the first five months of 2001.[102]

According to Dr. Hugh Gamble, President of the Mississippi State Medical Association, obstetricians and their patients are among the hardest-hit by lawsuits: 324 Mississippi physicians have stopped delivering babies in the last decade, and only 10% of family physicians will deliver a child.[103] In 2001, the liability insurance rates Mississippi doctors who deliver babies rose between 20% and 400%.[104]

While most states have enacted some form of legislative reforms to address medical liability, ATRA advocates a comprehensive reform package similar to that adopted by California in the Medical Injury Compensation Recovery Act (MICRA) of 1975. California's MICRA law is a comprehensive medical liability reform package that limits noneconomic damages at $250,000, allows for the introduction into evidence of collateral

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Law, 8 CORNELL J.L. & PUB. POL'Y 421, 426-28 (1999).

[100] *See* Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, N.Y. TIMES, June 24, 1999, at A14, *available at* 1999 WL 30524372.

[101] *See* Gov. Ronnie Musgrove, The State of the State Address (Jan. 4, 2001) *available at* http://www.nga.org/governors/1,1169,C_SPEECH%5ED_858,00.html.

[102] *See* Cassandra Perry, *Lawsuit Abuse Affects Medical Care*, DELTA DEMOCRAT TIMES (Greenville, Miss.), June 24, 2001, at A1.

[103] *See id.*

[104] *See* John Poretto, *Some Doctors in Mississippi Delta Giving Up Obstetrics*, BATON ROUGE ADVOCATE, Nov. 19, 2001, at 2B, *available at* 2001 WL 3876247.

source payments received by the plaintiff, permits the periodic payment of judgments in excess of $50,000, allows patients and physicians to contract for binding arbitration and limits plaintiffs' lawyers' contingent fees according to a sliding scale.[105] It is estimated that from 1986-1996 these reforms saved California insurers (and by extension physicians) approximately $500,000,000 (in 1995 dollars) in claim payments.[106]

Prior to MICRA's enactment, California physicians saw a rise in medical liability claims and insurance costs that parallels their Mississippi colleagues' experience in 2000.[107] California's MICRA reforms have helped stabilize health care costs in the state and there has been no showing that the quality of patient care has been adversely affected.The enactment of legislation similar to MICRA deserves serious consideration in Mississippi.

Access to medical care is inextricably linked to the cost of such care. As the *Sacramento Bee* observed in a recent editorial opposing personal injury lawyer-led efforts to increase MICRA's noneconomic damage limit, "Every dollar in higher awards to people injured in malpractice will mean one less dollar available for care."[108]

Further, a report prepared by the Law and Economics Consulting Group (LECG) indicated that an increase in the size of an expected award or settlement in a malpractice claim tends to encourage more claims, an experience borne out by Mississippi's recent rise in both judgment amounts and claims against physicians.[109] Not surprisingly, the report noted, "Research has shown that when a cap is imposed on non-economic damages, the average size of medical malpractice claims goes down."[110] Most importantly, however, empirical research suggests that the adoption of medical liability reforms similar to those in place in California since 1975 can conserve precious health care dollars with no adverse affect on the quality of care the patient receives.[111]

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[105] *See* CAL. CIV. PROC. CODE § 667.7 (West 1987) (providing for periodic payment of damages); *id.* § 1295 (West 1982) (allowing physicians and patients to contract for binding arbitration); CAL. CIV. CODE § 3333.1 (West 1997) (allowing collateral source evidence); *id.* § 3333.2 (providing limitation on noneconomic damages); CAL. BUS. & PROF. CODE § 6146(a) (West 1990) (limiting contingency fees).

[106] *See* LAW AND ECONOMICS CONSULTING GROUP, CALIFORNIA'S MICRA REFORMS: HOW WOULD A HIGHER CAP ON NON-ECONOMIC DAMAGES AFFECT THE COST OF AND ACCESS TO HEALTH CARE? 11 (Fall 1998) [hereinafter CALIFORNIA'S MICRA REFORMS].

[107] *See* CALIFORNIANS ALLIED FOR PATIENT PROTECTION, HISTORY OF THE CREATION OF MICRA, *at* http://www.micra.org (last visited Feb. 17, 2002).

[108] *Opinion*, SACRAMENTO BEE, June 5, 1999, at B6.

As a result of MICRA, California's medical liability costs have decreased as a percentage of the national total, even though the corresponding percentage of physicians practicing in California has remained stable.[112] Similar stability in both the cost of liability insurance and in the availability of care is needed in Mississippi as well. MICRA-style reforms can help.

VI. TOGETHER, MISSISSIPPI'S SUPREME COURT AND LEGISLATURE CAN IMPROVE THE MISSISSIPPI CIVIL JUSTICE SYSTEM

Solving the problems manifest in Mississippi's civil justice system will not be easy; it will require the efforts of both the Mississippi Supreme Court and the Mississippi Legislature.

In the context of medical liability and punitive damages reform, the Mississippi Legislature is best-suited to initiate a reform effort. The Legislature can weigh the broad public policy implications of civil justice reform, receive input from diverse interests across the political spectrum and craft a compromise that balances these often competing interests. While Shane Langston, President of the Mississippi Trial Lawyers Association (MTLA), has acknowledged problems with the current Mississippi system,[113] many of the modest recommendations put forth here will likely face opposition from the MTLA. Notwithstanding opposition from the trial bar, if the Mississippi Legislature considers these reforms, it will also likely hear messages of support from physicians and business constituencies that have publicly expressed their belief that civil justice reform is necessary.

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[109] *See* CALIFORNIA'S MICRA REFORMS, *supra* note 106, at 3.

[110] *See id.* at 7.

[111] *See* Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?* 111 Q.J. ECON. 353, 388 (1996).

[112] *See Medical Malpractice Tort Reform: Lessons from the States*, ISSUE BRIEF (Am. Acad. of Actuaries, Washington, D.C.), Fall 1996, at 3.

[113] *See* Jerry Mitchell, *Court: Tort Reform Possible,* CLARION-LEDGER (Jackson, Miss.), Aug. 22, 2001, at A1.

In the past, the Mississippi Supreme Court has consistently upheld as constitutional laws modifying the state's civil justice system.[114] ATRA is confident that the Mississippi Supreme Court will continue to uphold the constitutionality of civil justice reform legislation in the future and encourage the Legislature to consider enacting the above proposals.[115]

The Mississippi Supreme Court, in turn, has been proactive in reforming the Mississippi rules of civil procedure. The court recently placed a $100 million maximum limit on the appeal bond required to appeal a large punitive damages verdict.[116] This newly imposed limit is a recognition that a defendant's inability to afford an appeal bond can serve as a significant barrier to justice and is a move in the right direction.[117] A more definite statement from the court could clarify that the new limit is intended to apply in all but the most unusual of circumstances.

CONCLUSION

The American Tort Reform Association is pleased to be a part of the ongoing debate regarding Mississippi's civil justice system and commends the *Mississippi Law Journal* for hosting this symposium. There is little doubt, in our view, that reform of Mississippi's civil justice system is essential. The points raised in this article highlight what ATRA believes to be very real problems with the administration of justice in Mississippi and reasonable solutions to them. We look forward to supporting the efforts of our allies in the state as this issue is joined before the Mississippi Legislature, the courts and the citizens of the state.

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[114] *See* Barnes v. Singing River Hosp. Sys., 97-CA-01552-SCT, ¶¶ 6-11, 733 So. 2d 199, 201-03 (Miss. 1999); Wells v. Panola County Bd. of Ed., 645 So. 2d 883, 889-99 (Miss. 1994); Reich v. Jesco, Inc., 526 So. 2d 550, 553-54 (Miss. 1988).

[115] *See generally* Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: a Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1 (2000).

[116] *See* MISS. R. APP. P. 8(b)(2)(c).

[117] *See* Mark A. Behrens & Donald Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 2 CLASS ACTION LITIG. REP. (BNA) No. 17, at 644 (Sept. 14, 2001), *also printed in* 29 PROD. SAFETY & LIAB. REP. (BNA) No. 21, at 515 (May 21, 2001).

MR. COCHRAN: Okay. We've got twenty-five minutes. The way I want to work it is y'all ask a question of any panelist. You have up to two minutes to answer the question and then whatever side answers, then the other side has their two minutes to respond. Okay? So we'll carry it through to 10:15. All right. Questions?

QUESTION: I have a plaintiff's question.

MR. COCHRAN: Could you be a little bit louder?

QUESTION: I'm sorry. I've never been accused of being quiet before. The plaintiff's side failed to address the venue issue that was raised by Mr. Clark in the disposition of the case.

MR. LANGSTON: Well, if I understand what Mr. Clark's saying, he wants venue where it's most favorable to defendants. That's the bottom line. It happens every day. I just get sick and tired of these removals—one after another defendants, corporate defendants, removing cases that belong in state court to federal court saying that the plaintiff has fraudulently joined an in-state defendant, and time after time after time our very conservative federal judiciary has to send it back down. Because that's why—they—the federal courts—want to choose their own venue. They talk about the joinder problem and so forth. Well, joinder happens in different procedural respects all over the country, not just in Mississippi. You have tens of thousands, sometimes hundreds of thousands of plaintiffs that are joined. And often defendants, corporate defendants, do the joinder. They'll file declaratory action—class-action-type things. They often MDL [Multi-District Litigation] cases. You can have, you know, cases that are filed all over the country in state and federal court. And the defendant goes in and tries to MDL the cases in federal court for the purposes of choosing what they perceive to be a favorable venue. So, again, Mr. Clark didn't identify the seven counties he had a problem with, but C.T. Corporation used to be located in Hinds County. That's the corporation that accepts service of process for out-of-state corporate defendants. Well, they moved across the street over in Rankin County because that's where they want to be sued. You know, to me it's a—you know, they want to play different rules for the—for the defendants versus the plaintiffs.

MR. COCHRAN: Okay. Shane, that's two minutes. Response?

MR. CLARK: Shane hasn't answered your question I don't think. And I think—because the venue rules, we submit, as I mentioned the Rule 82, if we went to some—what happens with ours is if you allow under Rule 82, if you have proper joinder, you can bring the claim where it would be right for any one plaintiff. There are problems with that, and we see the abuses in the mass joinder cases. Other states, Alabama, Texas, are just two nearby examples that have said, basically, "Look, venue has got to be right as to every plaintiff." So—and I think that's fine. I think if you have a right to—otherwise you have laws and you have rules. And if those allow you to be in one court or another, then that's where you should be. We just suggest that the way our venue rule has been used in conjunction with the joinder rules that we need to have restrictions on the venue.

MR. COCHRAN: Next question.

QUESTION: I've got a question for David Clark about your comment about attracting jobs to the state. David, in addition to doing plaintiff's work, I am the city attorney over in the little town of Batesville since 1978 (Inaudible.) So I acknowledge economic development is very important to the state of Mississippi, but wouldn't you acknowledge that economic development in attracting jobs is a means instead of an ends in itself? That is, economic development should be for the benefit of the people in Mississippi rather than on the backs of people in Mississippi. In other words, couldn't we do away with all environmental regulations in Mississippi or do away with all wage and hour laws in Mississippi and do away with all industrial safety in Mississippi? We certainly have economic development in Mississippi. (Inaudible.) But should that be the goal? Isn't the goal improving the lives of the people in Mississippi? And if we do away with the protections that we have in the current civil justice system, wouldn't it be detrimental to the people in Mississippi? (Inaudible.)

MR. COCHRAN: All right. That's got the question.

MR. CLARK: You got a two-minute limit on the question.

MR. COCHRAN: You got the question.

MR. CLARK: They are not incompatible. Other states have shown this. We're not taking away anybody's rights of access to the courts. Our state did—you know, in terms of the access to the courts prior to 1995, you know, we were doing just fine. We have lost fifteen percent of our manufacturing jobs in the last few years. And nobody wants them. We don't need to and don't want to. And I don't think industry would want now to get rid of environmental regulations, wage and hour, if we could even do it. But the thing is you have to—number one, we have this perception from outside that is a reality we have seen. And I think we have to show that our courts are fair; that they're going to treat everybody the same. And I think there's nothing wrong with it. And I mean—I think we look next door to Alabama and say, you know, look at the boom they've had since they've introduced tort reform. And everybody still has access; we still have jury trials over there. So I don't see them as incompatible at all with economic progress and access to the courts, but I think that—or tort reform—I think that's—we can go in that direction, and I think it will help us.

MR. COCHRAN: Response? You got a minute.

MR. BIRCHFIELD: In Alabama, I mean, that was the same spiel that they were giving over there. They were saying that it's hurting businesses, but, you know, the number of businesses that were coming into Alabama before we passed tort reform, I mean, were consistent. Alabama was growing. We were attracting the Mercedes plants to Alabama before we had tort reform in Alabama. That's one of the myths that Shane referred to earlier. And I think that we do need to address David's comments about not denying access to the court. And he can only make that statement, I believe, if none of his clients are the ones that he's expressing opinions for today don't have arbitration and don't require arbitration in their consumer contracts because, I think, that David would be hard pressed to say that arbitration does not deny access to the courts.

MR. COCHRAN: Next question.

QUESTION: I wish that during the day that we'll discuss the settlement factor and the fact that all the time the statistics are cited with regard to the jury verdicts and the amount of jury verdicts, but the plaintiff's bar never talks about the fact of the influence of large punitive damage awards and other awards on settlement factors in cases. But the one question I really want to get to is judicial selection; that is, in Mississippi, from time to time, we have debated how judges are selected in this state. What I would like to know is do you think the $600,000 that Icepack (phonetic) gave to Governor Musgrove this last election make some sort of difference when he decides how to fill the judicial vacancies in the state? Who does he choose for the defense bar or who does he choose for the plaintiffs?

MR. COCHRAN: Who is the question—all right. Who is the question going to?

MR. LANGSTON: I'll respond to that. Well, why don't you ask the Mississippi Economic Council who just applauded Governor Musgrove's most recent appointments to the Mississippi Supreme Court, Justice Graves and Justice Carlson. Mississippi Economic Council applauded those appointments as they have other appointments that Governor Musgrove has made. So the answer to your question is no, it has not, but you're talking about appointed judges versus elected judges.

I'll tell you this, the appointment process, as we've seen in the federal judiciary, doesn't take politics out of the judiciary. There are going to be politics in the judiciary. Justice Scalia whipped down a couple of orders without any briefing by the other side at all in our most recent Mississippi Supreme Court elections where challengers on the Supreme Court were challenging the U.S. Chamber of Commerce ads where they were dumping millions of dollars into Mississippi to influence the outcome of judicial elections. Scalia, who's appointed, hustled down here and vacated two orders entered by a local chancery judge who is elected. So I don't think that that takes politics out. But Governor Musgrove's appointments have been applauded across the board.

MR. CLARK: Not across the board. My boards anyway.

MR. LANGSTON: Well, I haven't seen any criticism. You might have.

MR. COCHRAN: All right. Response. You got a minute and thirty to respond.

MR. CLARK: I think—I think all of us who went through last fall's Supreme Court elections would prefer not to go through those again. I think the influence of money, and I think others have talked about that, and I think as "Tiger" Joyce said, and others suggested, it's not one way that Shane mentions the "millions of dollars" the U.S. Chamber put in. They put in—it's reported—so I mean they filed it a little over $900,000. They were out spent by the other side two to one. So—but I think that is a problem and something we would like to take the influence of money out in politics to the extent we can.

MR. JOYCE: Can I make a quick comment? I think that a debate—I've been asked my own view on selections. I think there's no perfect system. I started working in the U.S. Senate the week that Judge Robert Bork was nominated. I don't think you can say that there wasn't politics in that or money on both sides. I think the money will find its way. The thing that people need to understand is there's so much on the line with these judges when they assume the responsibility. Some of them, whether you agree with what you say about Justice Scalia or what we would say about members of certain state supreme courts, there is a lot on the line, and that's why advocates and sort of quote/unquote both sides do get involved.

MR. COCHRAN: Question?

QUESTION: Yes. My question is to the plaintiff's side here. You don't seem to be acknowledging there is any problem here. In talking about the Holmes County verdict last week that's been alluded to several times of sick plaintiffs, not getting into the argument of whether they're sick or not, they obviously were not one of the plaintiffs in this case. Excluding what they got in settlements beforehand, they received a verdict of $150 million against three defendants. This now is going to take a bond—and that was only compensatory, no punitive damages. This is going to take a bond of $187 million to appeal. You want to tell us again that there is no problem with this system? That there is a real right to appeal?

MR. LANGSTON: If those plaintiffs were uninjured and were awarded a $150 [judgment]—I wasn't in the trial. I don't know if you were in the trial. I didn't hear the evidence. [If] they were uninjured, then that's out of whack. There is no question about it. And we do have the process—the first thing is to ask the judge to remit it. Has that happened? Well, there has not been a decision on that. But if it is out of whack, the judge can remit it, and there's no bond requirement. And which happens frequently.

QUESTION: Do you agree that's out of whack?

MR. LANGSTON: No. I said I was not there. I was not on the jury. I don't know whether they were injured or not. I believe I heard the—"Tiger" say that—now, on the other hand, if they were injured, that's different. Well, I agree. I don't know if they were injured or not. Obviously, the jury thought they were.

QUESTION: But you don't see a problem with having to post a bond of $187 million to appeal that case?

MR. LANGSTON: No. I don't see a problem of having to post a bond of $187 million if the jury, first of all, returns the verdict after hearing the evidence. And secondly, the judge, after hearing the evidence, reviews the verdict and determines that it's fair and is not out of whack or influenced by undue prejudice or sympathy. If the judge makes that determination, then there's absolutely nothing wrong with posting the bond. Because if they don't post the bond, then in a year and a half or a year after the verdict is returned, if it's affirmed, then the plaintiffs may have no means to collect the judgment. Because the companies can do a lot of things in the meantime.

MR. COCHRAN: That's two minutes. Hold on. That's two minutes. David, I think that's going to be yours. Do you want to answer this? Which one?

MR. JOYCE: I was wanting to make a quick comment. I was basing my remarks on what I read in the *National Law Journal* which was a direct quote from the lawyer for the plaintiffs which is that none of them were sick. None of them had cancer. David may be able to answer.

MR. CLARK: No. They did not have cancer. They did not have asbestosis according to the plaintiffs' lawyer. They were such hard workers they never missed a day of work in their lives. Anyway, it was the fear of cancer that supposedly led to the verdict.

QUESTION: Mr. Cochran, I hated to disagree with you. I was too scared to do that twenty-five years ago. Your analogy of abortion on one side or the other is bothersome to me. The topic is, "Why We're Here." It is very bothersome to me, Mr. Birchfield, that you're here at all from Alabama because you got tort reform. You exported yourself over here, and there's more asterisks on your stationery than any Mississippi lawyers. And Shane—rather than one side or the other, he's here because he wants tort reform over there. They've moved the chains of compromise after $66 million verdict, and the governor signed the bill the next day. So rather than stating your claim with one side or the other, right now what would you tell this group that the Mississippi trial lawyers would agree to as a compromise on a tort reform act? What would you agree to rather than run the risk of it getting so bad that something gets turned down that you don't like?

MR. LANGSTON: Well, first of all, Mississippi trial lawyers, we don't make the laws; the legislature does. So they don't—often they don't ask us whether we're going to agree to it or not. We have the Mississippi Economic Council. We have the medical community. We've got the nursing home industry. Lots of groups have come to us and have asked us about various aspects of tort reform. And there are certainly some compromises that we could see, such as, you know, when you sue the medical community, you can't put the dollar amount in the complaint. The nursing home industry wants it clear that when we sue the nursing home industry you can't put the dollar amount in the complaint. Things of that nature that we don't have a problem with. But asking what we will agree on today—they're coming at us in so many different directions I don't know what a lot of them want. You heard "Tiger" say, "Well, we just want the same for the plaintiff as an individual as we do the corporations." They want caps on pain and suffering. How does that affect a corporation? They want caps on noneconomic damages, emotional distress damages. They want to get rid of the prospect of punitive damages. That doesn't affect individuals. So we're not sure exactly of what they want. So that's a difficult question to answer, but, yeah, we have—we are in conversation with several groups about various aspects of tort reform. Right now—

MR. COCHRAN: I don't know if there's a—do y'all want to reply to this or is this a nonresponse issue?

MR. JOYCE: I'll just make a quick comment. Punitive damages we think are—you know, continue to be a threshold issue. And whether it's a corporation that's the plaintiff or an individual, you know, I think that's something we've advocated for fifteen years, but we also—I tried to—the time was limited to articulate some new issues. Government retention of outside counsel; we think that ought to be done in the sunshine. We think that that's a way to protect taxpayers. To make sure that when the government does hire somebody that he or she is serving the interest of the government and not him or herself. It was a novel theory, as I said, that began here in Mississippi. But there are any number of issues. I'll be happy to send you our laundry list.

MR. COCHRAN: Next question.

QUESTION: I'm somewhat confused about the analysis in the sense of the application of the law and procedures. On the one hand, we hear nationally about lawyers singing hymns to jurors, and it's impossible for defendants who are out of state to win in Mississippi. On the other side of the coin, we see where the tobacco companies in individual cases have won every single case in those same counties where we hear that outside corporations can't win.

The question I have for you is, is the source of your dilemma the rules, the decisions of the Supreme Court, or is there something about the administration of those rules in the context of individual cases that may bribe these—

MR. COCHRAN: All right. That's going to go to the defense side to start out with.

MR. CLARK: I think there's some of both. I think, you know, one of the few things that's specifically in the rules would be the venue question, and perhaps it's in our rules now about the punitive damage bonding. I think it has been the application of the rules. I think those tobacco cases—I don't know when the last one of those was tried. I think if you—I don't think anybody would think about trying one of those again today in one of the counties that the plaintiffs tend to predominantly pick for their lawsuits.

QUESTION: (Inaudible.) L.C.F. just tried and won against the tobacco companies in the same county.

MR. CLARK: Well, that's not individuals. That's not individuals. That was tobacco companies—I mean asbestos companies suing tobacco companies. I think that was a little bit easier for the judge—not easier, but it was—didn't have the same concerns for the judge there apparently. I don't know the details on that, but there are going to be some people later in the day that can talk about that. But I think it has been the application, the stretching; that the Supreme Court has conceded that it has stretched Rule 20. And it stretched it even further by essentially putting in some terminology that's not in the rule with the pattern of conduct.

MR. JOYCE: I would just add quickly that our focus is on legal policy and the rules. That's what we see as the area that we focus on.

MR. BIRCHFIELD: The real reason for this concern is because the way that the venue laws and the joinder laws right now are applied, they provide access to the courts for the folks that are injured. If you take that away, if you say that you cannot you cannot join people outside the county where venue would not be proper there, then in these situations where you've got mass torts, where you've got literally millions of people that have been affected, whether it's through a pharmaceutical drug or through asbestos, if you have to line those up, and you have to go county by county, those people will die off before these cases are ever litigated. It is another issue of access to a jury.

MR. COCHRAN: Okay. We're getting short.

QUESTION: There was quite a bit of discussion about misinformation. Three stories in the national media repeatedly. The *New York Times*, *Washington Post*, CNN. First is the case that has been referred to quite a bit where six people got $150 million and they're not injured. Second, that there's thousands and thousands of more cases filed by the people in Jefferson

County than people who actually live there. In the third that defendants are named, such as this drug store, to get jurisdiction out of the federal court where it properly should vest, and there is no interest to pursue a verdict against that particular defendant. Are any of those three cases false? And if they are not, could you give us some specifics about false stories carried by the *Washington Post*, the *New York Times*, and the *Financial Times of London* which have been articles about this state.

MR. COCHRAN: Okay. You got one minute on each side.

MR. LANGSTON: Okay. Specifically, you're wrong about that. Those cases do not belong in federal court; they belong in state court. Our state court law governs what defendants are proper defendants. We had tort reform back in 1993 that addressed the retailer—local retailer—selling a defective product. The other myths that you challenged me on—one—another myth would be they indicated—I think David indicated forty-four insurance companies pulled out of the state of Mississippi because of large verdicts, and he quoted George Dale. I sent a three-page open record request to the insurance commissioner.

MR. COCHRAN: Whoa. Whoa. That's not answering his question.

MR. LANGSTON: Well, he talked about the myths.

QUESTION: Are any of those three—are they false?

MR. LANGSTON: The three being?

QUESTION: In other words, the defendants are named as defendants, but there is really no intention to enforce a judgment against that particular defendant, such as a retailer, to oust the federal courts of jurisdiction. Is that a true statement or is that not?

MR. LANGSTON: No. In many, many cases that would be a false statement because if the defendant—local defendant—has insurance and has the means to pay a judgment, then absolutely they would enforce it against a local defendant. If they don't have the means to pay a judgment, but they're still a proper defendant under Mississippi law, it doesn't matter whether we intend to enforce it against the defendant or not. They are a proper defendant.

QUESTION: Can you give examples where you actually enforced a judgment against a retailer in an out-of-state case. For this audience so they could hear it.

MR. LANGSTON: Yes. I've sued Chrysler Corporation and its retailer in a very significant, catastrophic injury. And I got a lot of money from the retailer.

MR. COCHRAN: Okay. We've got no time for you on that. One more question.

QUESTION: On your number of filings in Jefferson County, might not that be a little bit misleading that it's dropped given the fact that often what happens is a case is filed say under the name of (inaudible) and it gets forwarded. And then an exhibit "A" is attached with fifty to sixty other car wrecks and plaintiffs from all over the country? So might not those filings still be up pretty high?

MR. LANGSTON: I think they've dropped a lot since last year, but that 187 might be misleading because they're multiplaintiffs. But as you know, Judge Pickard is sending those cases out of Jefferson County right and left. He is applying much narrower and stricter interpretation of Rule 20 in his discretion. And if you're not from Jefferson County, he's sending you out of Jefferson County.

MR. COCHRAN: David, you got a response?

MR. CLARK: No.

MR. COCHRAN: Okay. I'll give y'all twenty seconds each to wind it up. And then I want to thank you for a great, great morning. All right. Closing statements each one of you.

MR. BIRCHFIELD: We talked about abortion, and we're on extremes. And one thing I did find encouraging from the comments here that we might be able to find some middle ground on and that is campaign finance reform. I think that we should limit—we should put limits there. But we've got to do it, and we've got to eliminate soft money, but I think that both Mr. Joyce and Mr. Clark are in agreement there; that they need to be some limits.

MR. LANGSTON: Very quickly, they mentioned judicial nullification of tort reform. What we hope to prevent is all of this hysteria from improperly influencing our judiciary on the other end, like the *Choctaw Maid* case. We have the broadest wrongful death statute in the nation. If they want to change the damages allowed in wrongful death, do it by the legislature, not the Mississippi Supreme Court, which I think is what happened in this recent decision. Doctors—the evidence is doctors are not fleeing Mississippi. They're more doctors, significantly more, over the past twenty years per capita in this state than there were twenty years ago.

MR. COCHRAN: Okay, David.

MR. CLARK: I think we just—again, we need to join the mainstream or rejoin the mainstream of the state. We don't need to be different in an unfair way. The only other thing is if we want to look to some close examples, look at Alabama. What's happened? We haven't heard anything bad about Alabama. We hear, oh, well, well, maybe you have got to go to arbitration or something like this. That's by contract. I think we'll be in fine shape if we adopt some reasonable tort reforms and we can do it.

MR. COCHRAN: Close it, "Tiger."

MR. JOYCE: You know, I want to thank the *Law Journal* for having us here. And I think it's great for the academics and the legal community to look at this issue. But the real challenge here is for this to become an issue for all the people in Mississippi. And we look forward to working with our friends here in Mississippi to help them to do that. Because when the citizens and the community asks for change, we think it's going to come about. Thank you.

MR. COCHRAN: It's been an honor to have this panel, and it's great to see a lot of you all here. Now, Charles has a couple of announcements, and then we'll take a break. Thanks.

MR. HEWINS: All right. First of all, thanks a lot to George Cochran and the rest of the panelists. I think they deserve a round of applause. (Applause) All right. First of all, anybody that's staying at the Alumni House Hotel, check out is one o'clock. If you're not staying the night and you haven't checked out yet, do that at the lunch hour. And they've got a conference room storage which is behind the desk, and if you want to store stuff in there you can do that. So be sure and do that. Also, we've got—we're very lucky to have the student court reporters here from the Ole Miss Court Reporting school. And they, you know, they're obviously doing a great job. I just want to say a couple of things. First of all, questions from the audience. When you ask the questions, be sure and speak up. As you can see, her back's to the audience for the most part. So it's a little tougher for her to hear. So make sure your questions are good and loud. And you've done a good job of it so far. Also, and I'm sure you've been told this in court many times, make sure that only one person is speaking at a time as well because it's hard to type when two people are talking. Anyway, we're going to take—let's say an eight-minute break. We're going to start back up at 10:25. Thanks.

MISSISSIPPI CIVIL PROCEDURE

PANELISTS
Mark Ballard, Moderator
Alan Untereiner
W. Scott Welch, III
Richard T. "Flip" Phillips
James D. Shannon
Justice George C. Carlson

MR. HEWINS: Let's go ahead and get started. The next panel is Mississippi Civil Procedure. This is going to be, I think, a very good one. We've got a lot of people who practice a lot of law in Mississippi and sat on the bench for a long while in Mississippi. So I think it will be well versed in civil procedure questions. The moderator is Mark Ballard. Mark Ballard is a journalist with the *National Law Journal.* He wrote the article, "Mississippi Becomes a Mecca for Tort Suits" which was referred to in the first panel, which is thought to be one of the articles that helped spark the debate that we are addressing today. So I would like to introduce Mark Ballard.

MR. BALLARD: Good morning. This should be fun. I look at this panel, the procedure panelists—if you will allow me this thought. We are going to put the flesh on the bones of the law. And the procedure, I guess we will be looking mostly at—what I have heard most is the joinder, Rule 20. Only Virginia and Mississippi have no class action. This joinder is a merge from the 1800s. And the idea was to allow for a judicial efficiency in cases where common issues relating to similar transactions or similar occurrences. That I am sure nobody—everybody knows that.

The Mississippi Manufacturers Association has said that the joinder is inconsistent with the purpose of the rules and contrary to the way other states and federal courts have addressed the issue. They say it is not systematic, and it allows for forum shopping. Mississippi Trial Lawyers Association, on the other hand, says that Rule 20 is the best way to insure consistent results and to promote judicial economy. And we are going to look at both sides of this issue with, I think, a pretty unique and informed perspective. So in no particular order we have Mr. James Shannon, a plaintiff's counsel from Hazelhurst, the Shannon Law Firm. He has been involved in some of the major drug trials that have been kind of mentioned peripherally in the first panel—$32 million, $77.5 million, $100 million verdicts. He is the only person in all of these panels who actually practices in Jefferson County.

We have Scott Welch from Butler Snow in Jackson, President of the American Board of Trial Advocates. He argued—I guess the seminal case on this *Alexander v. American Bankers*, in which five-four Mississippi Supreme Court on February 1st reinforced—some would say expanded—the mass joinder rule instead coming up with a state class action. We will be talking a little bit about historical perspectives and lack of procedures here.

Richard T. "Flip" Phillips from nearby Batesville. He's a named partner in Smith, Phillips, Mitchell, and Scott, Ole Miss grad—as is Mr. Welch to point that out—is lead counsel in a number of successful nationwide deceptive sales practices class actions litigation. Also we will be discussing the joinder rule from plaintiff's perspective.

Mr. Alan Untereiner—I hope I get this right—who wanted me to mention that in the program that he did not argue the *Kumho* case, but he was rather counsel—but did not necessarily argue it before the Supreme Court. He also wrote and filed an amicus for the U.S. Chamber in the *Alexander v. American Bankers* case. Went to Yale Law School.

And I think we are very lucky to have the Honorable George Carlson. Appointed a few weeks ago to the Mississippi Supreme Court, but having served for almost twenty years as the district court judge in Batesville as well. So, we are going to have twelve minutes each, it's my understanding, and then we will take questions for the remainder of the time. But first Mr. Welch wanted to say a couple things as former President of the [Mississippi] Bar Association.

MR. WELCH: Good morning, I am Scotty Welch from Jackson. And because I'm on the panel before my colleagues Grady Tollison and Reuben Anderson, who are both former presidents of our state bar, I snared the prerogative of saying one thing on behalf of the bar of the state of Mississippi. I know a lot of you are visitors here to our state, some for the first time. If you had just come to the United States from almost anyplace else, had never seen CNN, and turned on the news at any hour of the day or night, you'd be convinced that everybody in the United States has got anthrax right now. You might be similarly persuaded from what you've heard so far this morning that the bar of the state of Mississippi and our system of justice is in a deplorable state.

I think it is important that as we have this debate today, and I think it is an important debate, and it is an important public policy issue involved in some of these things, but I think that it's very important that we address this with the understanding that in the vast, vast majority of the jurisdictions in the state of Mississippi, in the vast majority of cases in the state of Mississippi, and in almost every circumstance with the lawyers participating in those cases, the canons of professional ethics, the rules of professional responsibility are observed. We have a fine bar in this state. We try cases—lawyers in Mississippi try cases all over the United States. I have got two partners in Boise, Idaho, as I speak, defending a case.

The system in Mississippi has got some problems right now. But I think from my personal view as a—somebody who—my specialty basically is defending personal injury cases. And I do all over the state of Mississippi. There are very few counties in which I have not tried a case. Most places, most times the system works, and the lawyers work it the way it is supposed to be done.

MR. BALLARD: I guess first, Mr. Untereiner.

MR. UNTEREINER: I am delighted to be here today to participate in this very interesting discussion so far of the Mississippi phenomenon, what some people called the Mississippi phenomenon. I have no doubt that there are a lot of causes that contribute to the recent influx of these large or mass tort cases and other large pieces of litigation in the courts of the state, and in particular in a handful of rural counties we have heard about some of those factors already. I am probably the least well-qualified person in this room, since this is my first trip to Mississippi to talk about a lot of those factors, about the political culture of the state, what make juries do what they do, about the composition of the state judiciary.

So what I am going to focus on is a couple of the doctrinal rules which I think are unusual in this state—civil procedure rules—that I do think make Mississippi stand out somewhat and have contributed to this phenomenon. And in particular I would like to talk about joinder under Rule 20. And then I would like to talk about the rules governing the admissibility of expert witnesses or expert testimony in Mississippi with a particular emphasis on hedonic damages testimony in a recent case of the Mississippi Supreme Court decided about the same time as the *American Bankers* case. I think in both of these areas, the Mississippi Supreme Court has taken positions in the past year that are fairly far outside the mainstream of other U.S. jurisdictions. And I think they are worth considering because I think that the difference in legal rules has a major impact on this phenomenon of cases being filed in the Mississippi state courts as opposed to the federal courts or other state courts where they might be appropriately filed.

On the issue of joinder, an early panelist David Clark talked a little bit about that. I don't want to repeat what he has said. The *American Bankers* case is obviously a very important case. Unfortunately, in my view, the U.S. Supreme Court didn't grant review to hear that case. I think it would be a mistake to infer from the failure to take that case that the U.S. Supreme Court in any way approved of mass joinder in Mississippi the way it was endorsed in the *American Bankers* case. I think the problem in that case was really a jurisdictional problem. The U.S. Supreme Court only takes final judgments out of the state courts, and, of course, that was an interlocutory decision. There were various arguments made for why they still should exercise review, but they may well have assumed that, you know, they could take a later case when the law was better developed in Mississippi on the subject. And I wouldn't be surprised if in a later case if the trend continues, they would get involved in addressing the due process issue, which I think is a serious issue.

The joinder rule is, as all you know, I am sure, allows joinder only when there are common issues of law in fact, and when the claim—when the plaintiffs either assert a right to relief jointly or severally or in respect to or arising out of the same transaction, occurrence, or series of transactions. Now, in the *American Bankers* case the claims the—the transactions or occurrences were really individual loan transactions between the plaintiffs and the company called Fidelity. And it seems to me that there were so many diverging facts that had to be proved for each claim and the actual transactions and occurrences were so different that it is hard to imagine that joinder could be possible in a case like this. And there were 1400 plaintiffs involved. I mean, that is an enormous number of plaintiffs. Granted they came out of five different cases in different counties. But it is just a very large number of plaintiffs and parties to face on the other side of the "V" in a case. And I think it is very unmanageable to have a case like that.

I think the dissent got it right. Four justices in the dissent said that you really have to have a common nucleus of facts to have joinder, and there should be a focus on whether the plaintiffs' claims are more similar than dissimilar. What happened in the case, though, in my view, is the plaintiffs were able to include a theory of conspiracy to defraud, and they, therefore, tried to link up American Bankers and Fidelity in a common scheme. And I think the Mississippi Supreme Court should have been a little bit more skeptical because that kind of argument can be made in a lot of cases. You can in a lot of cases identify some supplier or third party that does business with a corporate defendant, and, you know, you can argue that that's really what your claim is focusing on, and, therefore, there is a certain amount of commonality. And I think that's very problematic.

The Supreme Court relied on various reasons for doing what it did. One of them is the absence of class actions in Mississippi. And I think that is a subject worth serious consideration, whether there ought to be some reform in that area in class action—whether a class action rule should be adopted. It is somewhat odd that they rely on that, I think, because at least, as far as I understand it, these cases could not have been properly certified under the Federal Rules [of Civil Procedure]. So underlying that rationale is the idea that we have to read our joinder rules a certain way because we don't have class actions, and class actions would have taken care of this. Well, I am not sure class actions would have taken care of those particular cases. I am not sure they would have been certifiable. In fact, the federal courts where they were originally filed and then dismissed had concluded that they weren't proper actions. The problem with the procedure, as I see it, is the unfairest to the defendants of having to deal with a lot of unrelated claims and a lot of unrelated facts and the risk of jury confusion that arises from that.

To take a very—maybe a somewhat extreme example, if you are a defendant, imagine if somebody can sue you in the same lawsuit for race discrimination in employment, for antitrust violations, and maybe some of your customers can bring a product liability claim against you. I think all of us would agree that it is grossly unfair to require anybody to defend against such a diverse welter of claims in a single lawsuit. Why is it unfair? It is unfair because there are so many things coming at you at once as a party that it is hard to keep the juries focused. And there is a cumulative effect of these allegations. And it's the same reason that underlies the rules of evidence that don't allow prior bad acts to come in. You know, a defendant can be tarred and feathered with a lot of allegations that are unrelated. The jury will think that there is something really wrong there, and it becomes quite unfair.

Now, that's an extreme example that I gave, but I do think that the claims in *American Bankers* have a lot of differences. These are transactions that were entered into at different times; different representations were made; the damages were different; you know, the evidence would have been different on each claim in large measure; and I just think it creates a serious risk of jury confusion and unfairness. What's the solution to that? One solution may be, as I said earlier, to consider some kind of class action rule. Another solution may be for the Mississippi Supreme Court to be more active in explaining—in placing limits on the very broad discretion of trial judges to administer the joinder rule. The Supreme Court in the *American Bankers* case basically said that they were going to rely on the good judgment of trial judges and the very broad powers to mitigate the unfair effects of this rule. And, you know, I think it is a fair question whether that's enough. It is a fair question when there are due process concerns that have been raised, and there is unfairness in the way these cases are litigated whether you can rely just on the trial judge. It may be that the Mississippi Supreme Court's responsibility is to give greater guidance and to put some restrictions on the way these large cases can be litigated under the joinder rules. After all, class actions have all kinds of restrictions in them, and you have to satisfy those in order to be able to bring a class action.

Let me move now quickly to the expert testimony issue. Hedonic damages in particular is something I want to talk about. Someone on the earlier panel mentioned the *Choctaw [Maid] Farms* case, which is a very recent case, and I also want to talk about the case called *Kansas City Southern Railway v. Johnson* which was decided only a week after the *American Bankers* case by the Mississippi Supreme Court. That case recognized, I think, for the first time in Mississippi, that hedonic damages can be recovered in personal injury actions. Hedonic damages, I am sure almost everyone in the room knows, are damages for the loss of enjoyment of living. And the court surveyed some of the other approaches and—in other jurisdictions and adopted the position that that is a separate element of damages. What is more interesting to me, and I think that point is debatable. I think there are good arguments on all sides about—how to treat that element of damages and whether they ought to be recoverable. I don't want to talk about that here.

What I want to focus on is the expert witness issue. Mississippi follows the *Frye* test which is the old test from the 1920s case that says that expert testimony may be admitted if it's generally accepted as valid by the relevant scientific or expert community. In the federal courts in the last decade there has been a "C" change in the rules governing expert testimony. Beginning with the case, *Dalbriggins v. Merrell Dow* going through a series of other cases including the *Kumho Tire* case, the federal courts have gotten much stricter about weeding out junk expert testimony. And the U.S. Supreme Court has made clear that federal judges have to serve as gatekeepers. They have a serious obligation to serve as gatekeepers, and they have to examine whether the methodology used by experts is, in fact, reliable. And I think in the federal courts you are seeing more and more cases thrown out because they hinge on expert testimony which is really unreliable and should not go to the jury. And I think that is a positive development. And I know I will get a lot of disagreement on this point from this panel, other people on the panel and probably people in the audience, but I think it has elevated the quality of justice by throwing out some of these cases. And I think the quality of expert testimony in the federal courts has increased because lawyers have to be careful about this, and they have to look for experts who really are relying on solid methodology. Mississippi follows—

MR. BALLARD: Two more minutes.

MR. UNTEREINER: Mississippi follows the *Frye* test which is much more lenient. And in this *Kansas City Southern Railway* case, what is notable to me is the Court upheld the admission of expert testimony of the amount of hedonic damages based on a theory called “the willingness to pay“ theory which has been rejected by virtually every federal court that has looked at it. And the same expert who testified in that case has testified—sought to testify in a lot of federal cases. And almost unanimously those courts have said this is totally unreliable, and we are not letting it in. And the Mississippi Supreme Court in the *Kansas City Southern* case really didn’t examine that very carefully. They just, relying on the *Frye* test which is quite lenient and the, you know, abusive discretion review which is very differential, they let it in. And I would be concerned about the future impact of that decision in cases in the state.

Finally, I just want to come back to this point. You can argue about a lot of other factors, but I do think that the difference in legal rules is worthy of very serious attention.

And I think what the lawyers in Mississippi should do and what the courts of Mississippi should do is, when they are facing the question of whether to adopt an approach, they should look at what other states do and what the federal courts do. And lastly, the *Choctaw [Maid] Farms* case which cut back a little bit on hedonic damages by saying those aren't available in wrongful death actions. It—that case—and that case—this was a case that was decided on October 31st, which I gather was the last day that several members of the court were on the Mississippi Supreme Court before they stepped down. And it is worth reading the case, and there are several separate opinions which are quite interesting. But what I found encouraging about that case was that the majority carefully canvassed what other states have done and noted that only four states have allowed hedonic damages in wrongful death cases and took that quite seriously. And I think if that is an omen of the future, then I think that we are on the way to having the problem solved in Mississippi of the disparity in legal rules that help contribute to these—to this phenomenon.

MR. BALLARD: Well, now let's listen to the other side of it. Mr. Phillips.

MR. PHILLIPS: Grady, after standing up and talking for thirty years, I can't talk sitting down over there, so I hope y'all don't mind me standing up over here. Alan commented about this being his first trip to Mississippi. Alan and I had dinner together last night down here in Oxford and had a good time going around the Square and seeing Square Books and Faulkner's Statue on the Square and everything. And I appreciate Alan's comment that being his first trip to Mississippi, he didn't feel qualified to comment on the sociological factors that gave rise to this situation. So, allow me a point of privilege and let me say this. That being born in Oxford, Mississippi, and growing up in Mississippi during the turbulent 1960s, graduating from this Law School in 1972, and starting practicing law with an old courtroom lawyer that later became a populous governor of the state of Mississippi, I do want to comment a little bit about the sociological factors that have given rise to this situation. Why we are here today.

CLASS ACTIONS & JOINDER IN MISSISSIPPI

Richard T. Phillips

INTRODUCTION
"WHY ARE WE HERE TODAY?"

The unique posture of Mississippi with regard to class actions and joinder is not a new phenomenon.[1] The current Mississippi situation reflects 140 years of sociological and historical factors which—sometimes for good and often for bad—caused Mississippi to march to a different drummer through most of the twentieth century. What has changed as we enter the twenty-first century, I submit, is not just Mississippi; it is the world around it—a world undergoing massive changes and a monumental shift from an Industrial Age to a Post-Industrial Age. What brings the attention of the nation to this "state of fewer than 3 million people," as today's program brochure describes it, is the unique position of Mississippi in this new world.

Increasing numbers of citizens throughout the country today find themselves in a situation similar to that which gave rise, over the past 100 years, to Mississippi's system of civil justice. A state viewed by the rest of the nation as, at best, "out of step" throughout the last century, Mississippi, it turns out, has the laws *needed* by Americans in a post-industrial world—a world of mass marketing, and global distribution and commerce; a world of unbridled corporate capitalism and decreasing regulation by laissez-faire governments; a world in which the people of this country perform a primary (and we are now told patriotic) duty as *consumers* of goods and services.

Many of the circumstances giving rise over the last 100 years to the unique posture of Mississippi's legal system regarding the matters under discussion at this symposium are circumstances being faced today by Americans nationwide. This situation was never imagined in the pre-NAFTA world before instantaneous communication and multi-national business gave rise to the global society in which we now live.

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[1] *See, e.g.*, Tribbette v. Ill. Cent. Rail Co., 12 So. 32 (Miss. 1892) (setting forth a unique view of class actions even at the dawn of the Industrial Age).

The question that should be asked, I submit, is whether Mississippi should change *its* civil justice rules to become more like the rest of the country, a position espoused by some at this symposium, or, on the contrary, has the global shift to a post-industrial world created a situation where the *rest* of the nation would do well to examine Mississippi's experience and adjust *its* rules accordingly.

Nowhere are the factors that give rise to this situation more evident, both on a statewide and on a national basis, than in the field of class actions and joinder. Examination of these procedural issues goes a long way toward answering the question posed by the first panel: "*Why are we here today?*"

The initial inquiry, I submit, is two-fold: Why Mississippi? And why today? The question "Why Mississippi?" is fascinating—as much the material of William Faulkner as of John Grisham. An objective and scholarly examination of the sociological, economic and cultural factors which gave rise to the current legal situation in the State of Mississippi would make for interesting, and I believe surprising, reading. Perhaps the University of Mississippi School of Law and the University Sociology Department should undertake such a study.[2]

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[2] I must confess strong personal beliefs as to what some of the factors are that give rise to Mississippi's "consumer friendly" substantive laws. Having been born in Oxford, Mississippi, grown up in the state during the turbulent 1960s and having practiced law in 1972 with an old courtroom lawyer who in 1975 was elected governor by the first coalition of Mississippi blacks and working-class whites bound together by a common economic condition, I witnessed the budding recognition of shared cultural values by Mississippians of different races. I have seen those shared cultural values at work in the Mississippi judicial system as groups of twelve citizens representing a cross-section of the socio-economic makeup of the state serve on Mississippi juries.

To those who assert (and to those many more who believe but do not publicly assert) that high-profile verdicts in Mississippi are the result of racial factors I must say: "You are wrong." The factors giving rise to substantial punitive damage verdicts in consumer litigation in Mississippi today, in my opinion, reflect a

Even more important to our initial inquiry is the second part of the question: "*Why today*?" Why is it that after being ignored by the nation's business and legal communities throughout most of the twentieth century, or simply disregarded as an anomaly, Mississippi is now on the radar-screen of the nation's corporate "tort-reformers?" And why is it that consumers from throughout the nation, often victims of "sweetheart" class action settlements, are turning to Mississippi as a court of last resort?

The answers to these questions reveal a fundamental shift in the nature and purpose of civil litigation in America as society moves from an Industrial Age to a Post-Industrial Age. The issues we debate here today, and the actions of the Mississippi Supreme Court and of the state Legislature with regard to these issues, carry significant consequences for the people of Mississippi and additional consequences far beyond the borders of this small state.

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moral outrage with how business is done in America which cuts across racial, socio-economic and demographic lines. The $32 million verdict returned by the jury in *Jackson National Life Insurance Co. v. Haggan*, No. 96-0295 (Cir. Ct. Copiah County, Miss. Aug. 25, 1999), exemplifies this situation. The Mississippi jury that returned this *unanimous* verdict consisted of the following demographic make-up: (Juror #1) a twenty-six year-old disabled black male, sitting next to (#2) a thirty year-old white male truck stop supervisor; (#3) a twenty-two year-old black female home care provider, next to (#4) a seventy-seven year old white female retired bookkeeper, next to (#5) a forty-two year-old black female housewife, next to (#6) a sixty-four year-old white male police officer; (#7) a thirty-nine year-old black male truck driver for Yellow Motor Freight, next to (#8) a sixty-three year-old retired white male agricultural worker; (#9) a forty-one year-old white male automobile dealership sales manager, next to (#10) a fifty-seven year-old black female textile worker; and (#11) a forty-four year-old black female hospital employee, sitting next to (#12) a forty year old white male contract sales manager.

The *Haggan* jury consisted of seven men and five women; six black and six white; ages twenty-two to seventy-seven; Mississippians of every socio-economic group and every political persuasion. The *Haggan* jury, representing a cross-section of Mississippi society, when polled, affirmed that their verdict was unanimous—saying with punitive damages that the people of this state will not tolerate the type of deceptive corporate conduct that gave rise to that consumer action.

THE CHANGING PURPOSE OF CIVIL LITIGATION IN A POST-INDUSTRIAL WORLD

Civil litigation as we know it is a product of the Industrial Age. It arose in part to address the ills of *labor exploitation* and industrial safety issues of a new Industrial Age in America.[3] The underlying purpose of civil litigation throughout the twentieth century has been *compensatory*, i.e., to compensate the victims of economic injury or commercial injury in an industrial society.[4]

Today the world has changed. As Alvin Toffler pointed out in his 1980 book, *The Third Wave,* the Industrial Age has been replaced by a new global world, a mass society and a new "Third Age,"—an "Information Age."[5] Computer and communications technology has plunged us into an unprecedented mass society in which multi-national corporations do business with consumers on a mass basis. New technology has given rise to new types of exploitation. In this new world, *consumer exploitation has replaced labor exploitation as the problem of our times.* Just as it did at the dawn of the last age, civil litigation is evolving to address these new problems.[6]

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[3] Civil litigation as we know it today was born in the late 1800s and early 1900s when, at the dawn of the Industrial Age, mobile and salaried industrial workers replaced the agricultural laborers upon which an agrarian society had been based. Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-sense Casualty*, 20 LAW & SOC. INQUIRY 621, 643 ("The fire symbolized the helplessness of industrial workers in the face of dangers over which they had little control and to which the law had hitherto, for the most part, simply abandoned them"). This new class of labor was left without the limited social "safety nets" of personal relationships which protected workers and their families in the earlier age. *See generally id.* Additionally, products of the new age, such as railroads and automobiles, rapidly changed the face of society and gave rise to new types of injuries. *Id.* High profile tragedies such as the 1911 fire at the Triangle Shirtwaist factory in New York City (where 145 employees died trapped in a factory fire because the exit doors had been boarded up to prevent pilfering) stimulated public indignation toward workplace safety issues. *Id.* at 622. Social ills such as child labor came to the front. In the early 1900s, tort law experienced what Oliver Wendell Holmes called a "creative epoch" when civil litigation adjusted to the massive societal changes brought on by the new age. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 89 (Little, Brown & Co. 1923) (1881). Workers' compensation and employee safety laws were enacted at the turn of the century and new applications of tort law arose to provide recompense to the victims of injury and misfortune.

[4] Writing at the dawn of the Industrial Age, Oliver Wendell Holmes in *The Common Law* introduced and defined the concept of civil litigation in American law as we know it today. HOLMES, *supra* note 3, at 77, 130 (describing tort law as we have known it for the last 100 years in chapters titled "Torts-Trespass and Negligence" and "Fraud, Malice, and Intent—The Theory of Tort"). Written as a series of essays entitled *Primitive Notions in Modern Law* beginning in 1876, and published as a book in 1881, Holmes' *The Common Law* has been described as the "cornerstone of jurisprudence during the twentieth century."

Civil litigation at the dawn of the twenty-first century is serving the same function it did at the dawn of the last century. It is the means by which society addresses the social ills not being addressed to its satisfaction by regulatory or legislative means. In the process, the fundamental purpose of civil litigation today is shifting from a strictly *compensatory* purpose to *regulatory* or *punitive* purposes. At the same time, the procedures required for civil litigation are changing—not least in the field of class actions and mass litigation.

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[5] ALVIN TOFFLER, THE THIRD WAVE 9-11 (1980). The premise is that mankind has experienced three "waves" of change. These waves are critical turning points in human social development. The "First Wave" of change was the Agricultural Revolution. *Id.* at 10. With the rise of agriculture, human society evolved from small, migratory hunter groups or tribes into civilizations. *Id.* at 37-38. The "Second Wave" was the Industrial Revolution of the eighteenth and nineteenth centuries. *Id.* at 13-14. Starting in the mid-1700s, industrialization revolutionized life in Europe and North America and quickly spread around the globe. *Id.* Toffler's proposition is that the tide of industrialism peaked in the decade after World War II. *Id.* At some time around 1955, Toffler postulates, a new, then-little-understood "Third Wave" began—an "Information Age" that would change every aspect of life as we know it. *Id.* at 14. Today the revolutionary premise of *The Third Wave* is an accepted principle of everyday life. The world lives, works and plays in a new Information Age. *Id.*

[6] Social programs such as Medicare, Medicaid, Social Security and other programs nonexistent at the dawn of the twentieth century have alleviated many of the problems for which the last century's civil tort law was originally developed. Voluminous labor laws, safety laws, OSHA regulations, etc., have eradicated many of the egregious practices that originally gave rise to twentieth-century tort law. Today's new age is giving rise to new problems in society—one of the most significant of which is consumer exploitation. Following Holmes' theorem, civil litigation is evolving before our eyes to address those problems. *See supra* note 3 and accompanying text.

CLASS ACTIONS IN MODERN AMERICA

Class action litigation is one of the most dynamic areas of civil litigation in America today.[7] The massive changes in class litigation within the past few years are a result of (and a reaction to) the societal changes that have given rise to mass tort litigation and an explosion in consumer litigation.[8]

Two significant trends have emerged recently in class action litigation nationwide. The first is an increase in filings of "non-federal question" class actions.[9] The second is a "migration" of the field of battle in consumer class actions from federal to state courts.[10]

1. *Non-Federal Question Class Actions*

Non-federal question class actions are class actions that lack any federal question jurisdiction, i.e., actions that arise from state common law or statutory claims. They include the types of cases that give rise to today's discussion, e.g., life insurance deceptive sales practices cases, pharmaceutical and products liability actions, and consumer fraud cases, as well as toxic torts, asbestos, tobacco and other mass tort litigation.

2. *The Nationwide Move to State Courts*

The trend of litigating such actions in state, rather than federal, courts was recognized by representatives of both defendants and plaintiffs at a recent Practicing Law Institute (PLI) seminar in New York. The defendants' representative deemed such litigation "a growth industry," noting that "given federal court hostility to certification of non-federal question class actions, plaintiffs have proceeded to file a larger percentage of these putative class claims in state court."[11] The plaintiffs' representative similarly recognized a "dynamic trend toward plaintiffs' increasing utilization of state courts as their forum of choice in major product liability, mass tort and consumer fraud class actions: the 'big three' non-federal question categories."[12]

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[7] *See generally* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000).

[8] ADVISORY COMMITTEE ON CIVIL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON MASS TORT LITIGATION (1999).

[9] Joel S. Feldman, *Class Certification Issues for Non-federal Question Class Actions—Defense Perspective*, *in* NON-FEDERAL QUESTION CLASS ACTIONS: PROSECUTION & DEFENSE STRATEGIES 2001, at 190 (PLI Litig. & Admin. Practice Course Handbook Series No. 660, 2001).

[10] *Id.*

The move of consumer class litigation from federal to state courts nationwide is a consequence of the increasingly inhospitable atmosphere in which class action plaintiffs find themselves in federal court today.[13] The problem is particularly acute for consumers in Mississippi—a state with consumer-friendly substantive laws, but no state court Rule 23 class action procedure.

MASS LITIGATION IN MISSISSIPPI

Mississippi is one of only three states that never adopted Rule 23 as a part of their state rules of civil procedure.[14] There are no Rule 23 class actions in Mississippi state courts.[15] In addition, state law in Mississippi is very consumer friendly.[16]

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[11] *Id.* at 177.

[12] Elizabeth J. Cabraser, *Class Certification of Non-federal Question Claims: Strategies for Plaintiffs*, *in* NON-FEDERAL QUESTION CLASS ACTIONS: PROSECUTION & DEFENSE STRATEGIES 2001, at 41 (PLI Litig. & Admin. Practice Course Handbook Series No. 660, 2001).

[13] *See* Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1192, 1197 (9th Cir. 2001), *amended and superseded by* 273 F.3d 1266 (9th Cir. 2001) (affirming district court's denial of class certification because plaintiffs failed to demonstrate, among other things, predominance, superiority and limited funds); *In re* Life USA Holdings, Inc., 242 F.3d 136, 148 (3d Cir. 2001) (holding that district court improperly exercised its discretion in certifying class because predominance requirement had not been met and that "the superiority and the management of the trial court not be fairly and efficiently conducted as a class action"); Andrews v. Am. Tel. & Tel. Co., 95 F.3d 1014, 1025 (11th Cir. 1996) (decertifying class finding that claims would not be manageable class); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (decertifying class because it failed superiority requirement of Rule 23(b)(3)).

[14] HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 13.04 n.23 (3d ed. 1992). The other states which have no Rule 23 state court class actions, Virginia and New Hampshire, both expressly recognize "equitable class actions," discussed below, in consumer litigation.

[15] Marx v. Broom, 632 So. 2d 1315, 1322 (Miss. 1994) (recognizing that court

What does a state with no Rule 23 class action procedure do "in an increasingly complex society with huge multi-national corporations peddling their mass-produced consumer goods and drugs by instantaneous satellite communication"?[17] How do consumers who suffer at the hands of wrongdoers in the modern corporate world obtain recompense and deter fraudulent conduct in such a state? Necessity is indeed the mother of invention—or at least innovativeness—and the answer is:

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intentionally omitted Rule 23 in enacting Mississippi Rules of Civil Procedure); Barrett v. Coullett, 263 So. 2d 764, 765 (Miss. 1972) (noting that under limited circumstances, class suits have been recognized in Mississippi as matter of general equity jurisdiction). The aversion of the state to class action is not of recent origin. One of the most widely cited cases in the history of class actions is a 1892 Mississippi Supreme Court case. *See* Tribbette v. Ill. Cent. Rail Co., 12 So. 32, 32 (Miss. 1892) (disagreeing with one of the leading legal commentators of the time, Pomeroy, who argued that "mere community of interest in the questions of law and fact" was sufficient to give rise to class joinder, and holding that there must be independent grounds for equity jurisdiction in order for courts to take cognizance of "class action" in equity). The early Industrial Age factual example used by the court to illustrate the horrors of such joinder is quaint in light of today's class action and joinder rules and multi-district litigation designed to address the pressures faced by today's courts if every case were litigated on a one-by-one basis:

> The wrecking of a railroad train might give rise to a hundred actions for damages instituted in a dozen different counties, under our law as to venue of suits against railroad companies, in some of which executors or administrators or parent and children might sue for the death of a passenger, and in others claims would be for diverse injuries. If Pomeroy's test be maintainable, all of these numerous plaintiffs, having a community of interest in the questions of law and fact, claiming because of the same evidence, and seeking the same kind of relief, (damages,) could be brought before a chancery court in one suit to avoid multiplicity of suits. But we forbear. *Surely the leaned author would shrink from the contemplation of such a spectacle.*

Tribbette, 12 So. at 33-34 (emphasis added).

[16] *See infra* app. 1 (exemplifying Mississippi's consumer-friendly law in area of financial fraud litigation). Appendix 1 is a comparison of two cases arising from the same alleged deceptive life insurance sales practice scheme by the same national life insurance company—one case decided under the consumer-friendly Mississippi law and the other under the consumer-adverse view of New York law.

[17] Guthrie T. Abbott & Pope S. Mallette, *Complex/Mass Tort Litigation in State Courts in Mississippi*, 63 MISS. L.J. 363, 374 (1994) (suggesting various methods for managing complex tort litigation) (citing COMPLEX LITIGATION PROJECT, ch. 2, *reporter's note to cmt. a*, at 11-17 (American Law Institute, Proposed Final Draft, April 5, 1993)).

Such a state develops innovative methods of handling modern, complex litigation. This is precisely what has happened in Mississippi.

The Mississippi experience has given rise to three alternative strategies for handling "class" and "mass" litigation: (1) the mass aggregation of individual claims under Rules 20 and 42 of the Rules of Civil Procedure, (2) the "ancient equitable remedy" of the "equitable class action" and (3) where all else fails, the prosecution of select individual cases for punitive damages.

1. *Aggregation of Individual Claims*

Far and above the most high-profile procedure in Mississippi is the aggregation of hundreds and even thousands of individual plaintiffs' claims in one case under the state's liberal interpretation of the joinder and consolidation rules of Rules 20 and 42.[18]

Mississippi has traditionally dealt with litigation involving large numbers of claimants through joinder under Rules 20 and 42 of the Mississippi Rules of Civil Procedure. Both rules in Mississippi track the federal rules.[19] Rule 20(a) allows permissive joinder in one action of multiple plaintiffs asserting rights of recovery arising out of the same "series of transactions" and involving "any common question of law or fact."[20] Rule 42 and Rule 20(b) place the issue of consolidation or separate trials in the hands of the trial judge.[21] Mississippi courts liberally allow the aggregation and consolidation of large numbers of claimants "to fill the gap left open by the unavailability of class actions in Mississippi."[22]

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[18] Am. Bankers Ins. Co. v. Alexander, 98-IA-00046-SCT, 2001 WL 83952, at *5 (Miss. 2001) (holding that joinder of approximately 1371 borrowers as plaintiffs was permissible).

[19] *See, e.g.*, Stoner v. Colvin, 110 So. 2d 920, 924 (Miss. 1959) (stating that court may consolidate separate actions by different plaintiffs brought against same defendants where damages resulted from same incident); Comstock v. Rayford, 9 Miss. 423, 438-39 (1843) (stating that unrelated parties with the same interests in a claim may be united in action).

[20] *See* MISS. R. CIV. P. 20(a).

[21] *See* MISS. R. CIV. P. 42 (permitting consolidation of actions presenting common issue of law or fact); MISS. R. CIV. P. 20(b) (allowing court to order separate trials).

In the late 1980s and early 1990s, the arrival of "mass tort" litigation caused use of the Mississippi liberal joinder procedure to explode. An active asbestos-using shipbuilding industry on the Mississippi Gulf Coast, combined with favorable personal injury, punitive damage and statute of limitations laws, gave rise to significant asbestos litigation in the state.[23] In an early Mississippi multi-plaintiff asbestos case, the claims of more than 6000 plaintiffs with various asbestos related injuries were handled by the Circuit Court of Jackson County, Mississippi, under an order that allowed a consolidated trial of common issues of law and fact.[24] The first trial was conducted in an auditorium at the fairgrounds in Jackson County, Mississippi, with fifty-three lawyers participating the day opening statements began.[25] The acoustics in the makeshift courtroom were so poor that the attorneys bought carpeting for the temporary facility.[26]

A six-year general statute of limitations, combined with decisions that made the statute applicable to out-of-state claimants, led to a flood of mass litigation in Mississippi—a situation which led ultimately to the amendment of section 15-1-49 of the Mississippi Code, thus reducing the general statute from six to three years, and to the adoption of section 15-1-65 which expressly prohibits cases in Mississippi on out-of-state causes of action barred by the statute of limitations in the state in which they accrued.[27]

Even with the new statutes, plaintiff-favorable substantive and procedural laws in the state (in matters such as punitive damages, pure comparative negligence and joint and several liability, for instance) combined with the culture of a hard-working society long the "underdog" (which produced consumer-friendly jury pools) began to draw all kinds of "mass litigation" to the unique venue.[28] Silicone breast implant cases, dioxin cases and tobacco litigation in the 1990s all served as jurisdictional and procedural groundbreakers leading to the mass pharmaceutical litigation, insurance litigation and consumer fraud litigation taking place in the state today.[29]

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[22] *Am. Bankers*, 2001 WL 83952, at *4.

[23] *See generally* Scordino v. Hopeman Bros., Inc., 662 So. 2d 640 (Miss. 1995); Owens-Illinois v. Edwards, 573 So. 2d 704 (Miss. 1990).

[24] *See* Abbott & Mallette, *supra* note 15, at 370-71.

[25] *Id.* at 371.

[26] *Id.* at 371-72.

[27] MISS. CODE ANN. §§ 15-1-49, -65 (1995).

The old Rules 20 and 42 joinder procedures become "innovative" when applied to modern consumer actions involving thousands of individual plaintiffs—often "opt-outs" from nationwide class actions deemed unfavorable to the class members.[30]

The situation culminated in the February 1, 2001, decision by the Mississippi Supreme Court in the case of *American Bankers Insurance Co. v. Alexander*,[31] which, I submit, is a primary impetus for today's program.

2. *The "Ancient Remedy" of Equitable Class Actions*

A second interesting and innovative method by which Mississippi courts deal with the vacuum caused by absence of a Rule 23 class action procedure is by reviving the "ancient equitable remedies" of "bill of peace" and "equitable class actions." In *Leaf River Forest Products, Inc. v. Deakle*,[32] a case involving the claims of 7000 dioxin plaintiffs, the state supreme court held that the "ancient bill of peace" remains a viable mechanism for the joinder of mass claims even after adoption of the Mississippi Rules of Civil Procedure.[33] The court stated:

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[28] *See generally* Abbott & Mallette, *supra* note 15, at 373-76.

[29] *Id.*

[30] *See* Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J. April 30, 2001, at A1 (discussing Jefferson County, Mississippi, mass tort cases involving more plaintiffs than county has residents). The current situation in Mississippi is certainly not without substantial criticism from the national and global business community. *See, e.g.*, Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION LEDGER (Jackson, Miss.), June 17, 2001, at A1 (part of a series of feature articles in the summer of 2001 entitled *Hitting the Jackpot in Mississippi Courtrooms)*; *see also* Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1 (noting that Mississippi juries returned at least nineteen verdicts of $9 million or more since 1995, including five that exceeded $100 million).

[31] 98-IA-00046-SCT, 2001 WL 83952; *see supra* notes 18-22 and accompanying text.

[32] 661 So. 2d 188 (Miss. 1995).

> The ancient bill of peace was a procedural vehicle employed when equitable relief was needed to prevent the hardship which would result from prosecuting or defending numerous actions at law. While the label "bill of peace" may not have survived the adoption of the M.R.C.P., the chancery court's authority to grant substantive relief through equity remains viable and available.[34]

Like the bill of peace, class actions were recognized in Mississippi as a matter of general equity jurisdiction long before adoption of the Mississippi Rules of Civil Procedure.[35] The Mississippi Code has long provided and still provides for costs in class action suits in the Mississippi chancery courts:

> Where a party hereafter institutes a suit for the benefit of himself and all others similarly situated, and thereby there is in such suit recovered or preserved property or a fund for the common benefit, the chancery court may make an allowance to such party of the reasonable costs incurred, which costs shall include the necessary disbursements, and reasonable solicitor's fees, out of the property recovered or preserved for the common benefit.[36]

When Mississippi adopted its rules of civil procedure, based generally on the federal rules, Mississippi purposefully omitted Rule 23 class actions.[37] In the Official Comment to Rule 23, it was stated, "Class action practice is not being *introduced* into Mississippi trial courts at this time."[38] In adopting the Rules, however, Mississippi did not *abolish* the chancery court's authority to handle equitable class actions.[39]

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[33] *Leaf River*, 661 So. 2d at 192.

[34] *Id.*

[35] Marx v. Broom, 632 So. 2d 1315, 1322 (Miss. 1994) (stating that class action lawsuits were recognized under general equity jurisdiction in chancery court prior to enactment of Mississippi Rules of Civil Procedure).

[36] MISS. CODE ANN. § 11-53-37 (1972).

[37] *Marx*, 632 So. 2d at 1322.

[38] *Id.* (emphasis added).

While the Mississippi Supreme Court has not had the opportunity to address the vitality of the "equitable class action" in chancery court consumer litigation, a number of decisions by lower courts have employed the remedy.[40]

In looking back to ancient remedies such as the "bill of peace" and "equitable class actions" for strategies in handling modern mass litigation, today's courts explore a deep well of alternatives employed by courts facing the dawn of a new Industrial Age. As pointed out in a 1997 law review article, "[t]he 'deep sleep' of collective litigation from seventeenth-century England to mid-twentieth century America was not complete, for some American counsel, courts, and commentators in the late nineteenth and early twentieth centuries faced issues with considerable modern resonance . . . ."[41] Exploration of such remedies for the benefit of modern consumers, made necessary in Mississippi by the absence of Rule 23, is benefitting consumers in other jurisdictions faced with unfavorable Rule 23 applications.

3. *Individual Punitive Damage Cases*

Finally, where all else has failed and there is no practical method by which the victims of nationwide consumer fraud may be compensated, a corporate wrongdoer may still be punished, and denied its ill-gotten gain, through individual cases for punitive damages in states like Mississippi which have favorable punitive damage laws. The recent life insurance deceptive sales practices litigation provides a classic example.

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[39] *See* Barrett v. Coullett, 263 So. 2d 764, 765 (Miss. 1972) (recognizing that class action suits are permitted in Mississippi as matter of general equity jurisdiction).

[40] *See, e.g.*, Am. Bankers Ins. Co. v. Booth, 2000-IA-00844-SCT, 2001 WL 835952 (Miss. 2001) (addressing issue of "equitable class actions" in consumer litigation, case submitted without oral argument Dec. 15, 2001); Walls v. USF&G Co., 2002-M-00185 (Ch. Ct. Panola County, Miss. Nov. 15, 1999) (attached *infra* as app. 2).

[41] Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and its Implications for Modern Class Actions*, 39 ARIZ. L. REV. 711, 712 (1997) (exploring historical aspects of bill of peace and its potential effects on modern procedure).

Virtually all major life insurance companies engaged in the "vanishing premium" sales practices of the late 1980s that have subsequently given rise to massive "market conduct" problems. The majority of purveyors have resolved their potential liability through settlement of nationwide class actions.[42] However, a few companies, like Jackson National Life Insurance Co. and Guardian Life Insurance Co., chose a different course, deciding money could be saved by contesting class certification and fighting individual cases.

Most companies that chose to contest class certification on a nationwide basis have been successful in defeating certification on procedural grounds. Individual issues of fact are found to predominate over class issues, and conflicts of laws among the various states cause the cases to fail the "superiority" tests for class certification on a nationwide basis.[43] But for substantial punitive damages in *individual cases* in venues with consumer-friendly punitive damage laws, corporate wrongdoers choosing such a course would *escape unpunished*; they would profit from their original wrongdoing; and, worse, other companies employing similar fraudulent sales tactics would follow their example.

The experience of Jackson National Life Insurance Co. is particularly instructive. This large purveyor of "vanishing premium" insurance conducted a high-profile publicity campaign touting its class action victories in deceptive sales practices cases. For example, Jackson National's attorney stated that "the case could be important for other insurers . . . that are fighting lawsuits seeking class status in federal court."[44] A

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[42] *See, e.g.*, *In re* Metro. Life Ins. Co. Sales Practices Litig., No. 96-179, 1999 U.S. Dist. LEXIS 22688, at *30 (W.D. Pa. Dec. 28, 1999) (approving $1.7 billion nationwide class action settlement); *In re* Prudential Ins. Co. of America Sales Practices Litig., 962 F. Supp. 450, 594 (D. N.J. 1997) (involving $2 billion class action settlement).

[43] *See, e.g.*, Keyes v. Guardian Life Ins. Co., 194 F.R.D. 253, 256 (S.D. Miss. 2000) (holding class certification inappropriate because individual issues substantially predominate over common issues); *In re* Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217, 223 (W.D. Mich. 1998) (holding that plaintiffs failed to carry burden of showing that common questions predominate).

[44] Deborah Lohse, *Suit Against Insurer Jackson National Is Denied National*

June 5, 2000 article states, "Lawyers for Jackson National, a Lansing, Mich. based subsidiary of Prudential Corp. PLC, London, suggested the ruling could encourage other life insurers to defend themselves against vanishing premium suits, rather than automatically settling out of court."[45] Jackson National's lead counsel chaired seminars, at which the company's in-house counsel spoke, urging life insurers to contest such actions.[46]

With class certification denied, however, Jackson National found itself, along with its individual agents, faced with suits seeking both actual and punitive damages by individual policyholders. The company was "out of the frying pan and in the fire." The first such case to go to trial in Mississippi resulted in a verdict including punitive damages of $32.5 million.[47]

In cases such as *Jackson National*, the restrictive interpretation of Rule 23 by which many federal courts have denied class certification have resulted in denial of recompense to thousands of defrauded policyholders throughout the nation.[48] It need not result, however, in the wrongdoer going unpunished and profiting from its wrongdoing.

PROBLEMS WITH CURRENT SITUATION

The real problems that give rise to Mississippi's status as "lawsuit central" are not the surface problems such as large verdicts being addressed by the media.[49] Whether $100 million

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Class-Action Status, WALL ST. J., Oct. 27, 1998, at B20, *available at* 1998 WL-WSJ 18989677.

[45] Allison Bell, *Jackson Fends Off a Third Class Action Certification*, NAT'L UNDERWRITER, June 5, 2000 at 3, *available at* 2000 WL 21309710.

[46] *See generally* Feldman, *supra* note 1.

[47] Jackson Nat'l Life Ins. Co. v. Haggan, No. 96-0265 (Cir. Ct. Copiah County, Miss. Aug. 25, 1999).

[48] *In re* Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217, 223 (W.D. Mich. 1998) (holding that plaintiffs failed to carry burden of showing that common questions predominate).

[49] Many critics of high jury verdicts in Mississippi harbor a core mistrust of the jury system. Jerry Mitchell, *More Insurance Firms Exit Miss.*, CLARION LEDGER (Jackson, Miss.), June 19, 2001, at A1 (quoting Mississippi Insurance Commissioner George Dale as saying: "You can't tell me that someone with a sixth-grade education, whose only income is from public assistance, can tell how many millions of dollars a company should pay. That's not a jury of his peers.").

punitive damage verdicts in consumer fraud cases are inappropriate in an era when the top two executives of Conseco—a life insurance company—were each paid over $70 million in annual compensation last year depends on one's view of social justice.[50] The verdicts returned by Mississippi juries today reflect the cultural values of the people of this state and their opinion of the conduct of corporate America. These values, I submit, are representative of the values of most of America today, although the expression of such values is thwarted by the civil justice system in place in much of the country. The problem causing the current influx of out of state plaintiffs into Mississippi is the *absence of effective means of consumer protection* in the court systems in most of the rest of the country.

There are, however, problems with the current situation faced by Mississippi consumers in the courts in Mississippi and I would like to address a few of them, briefly.

1. *"Federalization" of Common Law.*

The absence of a state court Rule 23 class action means that class actions in Mississippi, even those involving strictly Mississippi law, Mississippi citizens and conduct in the State of Mississippi, must be filed in federal court. As Guthrie Abbott and Pope Mallette point out in their 1994 *Mississippi Law Journal* article, "Serious federalism concerns arise when mass tort litigation is forced into the federal system."[51]

Professor Abbott and Mr. Mallette raise valid concerns when they state, "The handling of such cases sets the stage for development or refinement of substantive state law as well as the study and potential alteration of a state's system of civil procedure. State judges should be the decision-makers and authors in matters of such importance in a state."[52] In a hands-on look at the "federalization" problem, Ronald W. Eades notes "[T]ort law, as a part of the common law, grew up as a reflection of the customs and practices of local communities. . . . The ability of tort law to grow and change with the times arose by virtue of two important factors: tort law is court-created common law, and tort law is local law."[53]

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[50] *Executive Compensation in 2000*, INSURANCE FORUM, July 2000, at 11. Conseco's Current CEO was paid annual compensation of $70 million. *Id.* Its departing CEO was paid $77 million, including a $55 million severance bonus. *Id.*

[51] Abbott & Mallette, *supra* note 15, at 385.

[52] *Id.*; *see also* Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalism*, 44 DEPAUL L. REV. 755, 758-59 (1995) (recognizing a "heightened concern over increasing federalization of state law" and acknowledging that "the suggestion to federalize mass tort law . . . gives pause to even thoughtful propo-

As illustrated by appendix 1 to this paper, the laws of different states reflect the different cultures of those states—a fact nowhere more evident than in the field of consumer litigation. As Eades notes:

> [T]he United States is a large, diverse nation. It is often said that the United States is great because of its diversity rather than in spite of it. The police power of the states, including the power to create and manage the tort law to regulate local, diverse conditions, is part of that greater diversity.[54]

Unless the courts in Mississippi are allowed to handle mass litigation on an "aggregate" basis, such as that approved in *American Bankers*, the absence of state court class action procedures results in an abdication of the state courts of the power and responsibility to develop the law and address important issues that arise with increasing frequency in class action and mass litigation.

2. *Multi-district Litigation*

The "federalization" problem is made more acute by Multi-District Litigation procedures now invoked in federal court in most cases involving wide-spread problems of consumer fraud or mass product injuries. Under the Multi-district Litigation (MDL) procedures of 28 U.S.C. § 1407, the Judicial Panel on Multi-district Litigation (JPML) is authorized to transfer federal court civil actions pending in more than one district to a single district for coordinated or consolidated pretrial proceedings if the actions involve common questions of fact and trans-

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nents of expansive federal court access").

[53] Ronald W. Eades, *Attempts to Federalize and Codify Tort Law*, 36 TORT & INS. L.J. 1, 1-2 (2000) (analyzing creation and proliferation of tort law).

[54] *Id.* at 20.

fer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct [of such actions]."[55]

In theory, cases transferred under § 1407 are to be transferred back to the transferor court for trial after all pre-trial procedures are completed.[56] In practice, however, only a fraction of cases that are " MDL'd " ever return to the original trial court for trial.[57]

Multi-district transfer and consolidation, which is applicable only to cases in federal court and not to those filed in state courts, exacerbates the state court abdication problem. Multidistrict transferee courts are frequently in far-flung parts of the country.[58] The transferee courts, which address in such actions dispositive motions such as motions to dismiss and for summary judgment, frequently are from far different backgrounds than that reflected in the laws of the State of Mississippi; they are used to applying laws that reflect strikingly different social and cultural views.[59]

Particularly where class actions involve single-state classes of Mississippi citizens or issues of law unique to the State of Mississippi, it is unfortunate that such cases may not be decided by Mississippi state court judges under the overview of the Mississippi Supreme Court.[60]

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[55] 28 U.S.C. § 1407 (2000); *see* MANUAL FOR COMPLEX LITIGATION § 31.13 (3d ed. 1999).

[56] 28 U.S.C. § 1407.

[57] *See* Earl F. Kyle, IV, *The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589, 605 n.120-24 (1998) (recognizing that cases are often settled in transferee courts or are transferred for trial by transferee courts to themselves under § 1401 or § 1406).

[58] For instance, the nationwide class actions filed in federal court in the Northern District of Mississippi in the deceptive sales practices life insurance litigation were ultimately litigated in combined multi-district cases in the Southern District of California, the Eastern District of Missouri, the District of New Jersey, and the District of Massachusetts.

[59] *See, e.g.*, *infra* app. 1.

[60] *See, e.g.*, Walls v. USF&G Ins. Co., 2000-M-00185 app. 2 (Ch. Ct. Panola County, Miss. Nov. 15, 1999) (discussing whether "single limits" automobile insurance policies issued in Mississippi by defendant, USF&G of Mississippi, as adjusted by company, fail to provide minimum $10,000 per person liability coverage required by Mississippi Safety Responsibility Statute and seeking class action status on behalf of all Mississippi purchasers of USF&G "single limits" automobile

3. Effective Denial of Access to the Courts

Further, in consumer cases involving small individual amounts of compensatory damages, in the absence of *American Bankers* type aggregation rules, the lack of a state court class action procedure can completely bar access to the courts.[61]

PROBLEMS WITH PROPOSED SOLUTIONS

There are, however, problems with the solution proposed by proponents of Rule 23 class action procedures for Mississippi state courts. One reason class action procedures are under such scrutiny throughout the nation today is the problem of "sweetheart class action settlements."[62] Such settlements inure to the benefit of plaintiffs' attorneys (by providing large attorneys fees) and the corporate wrongdoer-defendants (by effectively "buying" immunity) at the expense of the consumers or victims class actions are supposed to protect.[63] Another problem is the increasing use of Rule 23(b)(2) "non-opt out" class actions to effectively deny consumers any remedy other than that afforded by the class action. Such problems in Mississippi State Court are avoided under the current *American Bankers* application of Rules 20 and 42.

Abuses of Rule 23 in jurisdictions that have the rule are one reason "opt out" plaintiffs from other states seek help in the courts of Mississippi. Thoughtful reflection should be had before the citizens of Mississippi are thrown into the situation from which much of the nation is trying to extricate itself.

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liability insurance).

[61] *See* H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes, Inc., 227 F.3d 326 (2000) (holding that *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978), controls over *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), and that punitive damages claims of putative members cannot be aggregated and attributed to each plaintiff to meet jurisdictional amount requirement in diversity jurisdiction common law fraud cases). *H&D Tire* is a consumer fraud case for compensatory and punitive damages seeking class action status in federal court where the plaintiffs' individual actual damages ranged from $72 to $999 each. *Id.*

[62] Hensler, *supra* note 7, at 93-99.

[63] *See id.* at 49-123.

CONCLUSION

One of the principal arguments of Oliver Wendell Holmes' *The Common Law* was that the law evolves in response to society's changing conceptions of public policy.[64] Society changes—and then the law changes. In recent years, society has undergone changes unlike any witnessed since Holmes' time at the dawn of the Industrial Age. The civil litigation issues being addressed here today—class actions in a mass society, punitive damages in an increasingly global economy and regulation by litigation in a world where governments themselves are becoming subservient to multi-national corporate interests—are evidence of changes in the law necessary to meet the challenges of this new society.

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[64] *See supra* note 3.

APPENDIX I

CULTURE CLASH

A COMPARISON OF MISSISSIPPI'S CONSUMER-FRIENDLY LAW TO NEW YORK LAW IN LIFE INSURANCE DECEPTIVE SALES PRACTICES

Compare *Gaidon v. Guardian Life Insurance Co.*,[65] a December 1999 New York case decided under New York law, with *Myers v. Guardian Life Insurance Co.*,[66] a Mississippi case examining the same alleged deceptive sales scheme under Mississippi law. In *Gaidon*, on the one hand, the New York court held that Guardian's alleged deceptive sales practice did not give rise to an action under New York fraud law.[67] In Mississippi, on the other hand, the identical practices do state a valid cause of action for fraud.[68]

Gaidon and New York law indicate a contract-oriented approach to the litigation, whereas *Myers* and Mississippi law reflect a consumer-oriented approach. In *Gaidon*, the "integration clauses" and "disclaimer language" in policies were held under New York law to "absolve [the company] of fraud."[69] In *Myers*, on the other hand, identical "merger-integration" and "disclaimer" arguments by Guardian were rejected under Mississippi law.[70]

The differences are even more pronounced in other cases. In *Goshen v. Mutual Life Insurance Co.*,[71] the New York Supreme Court granted summary judgment for the defendant in a deceptive sales practices case, stating:

> Gaining the confidence of potential clients through a

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[65] 725 N.E.2d 598 (1999).

[66] 5 F. Supp. 2d 423 (N.D. Miss. 1998).

[67] *Gaidon*, 725 N.E.2d at 185-86 ("A practice may carry the capacity to mislead or deceive a reasonable person but not be fraudulent.").

[68] *See, e.g.*, Phillips v. New England Life Ins. Co., 36 F. Supp. 2d 345, 348 (S.D. Miss. 1998); *Myers*, 5 F. Supp. 2d at 429.

[69] *Gaidon*, 725 N.E.2d at 186.

[70] *Myers*, 5 F. Supp. 2d at 430-31.

[71] 1997 WL 710669, at *10-*11 (Sup. Ct. New York County, N.Y. Oct. 21, 1997).

> display of professionalism, superior knowledge and expertise, is a technique hardly confined to the sale of insurance . . . . A considerable burden would be placed upon the insurance industry if insurers were to become *per se* fiduciaries for all of their insureds, based merely upon the trust which the insured placed in the superior knowledge of their sales agents. Such a theory would encompass virtually every instance in which a complex insurance product is sold to any party who is not in possession of the financial sophistication or knowledge of the sales agent. . . . *It is not, at the present time, a theory which comports with the law of this State.*[72]

The law in Mississippi reflects a stark difference in the attitude of the courts. For example, in the case of *Ross-King-Walker, Inc. v. Henson*, the Mississippi Supreme Court states:

> In the context of insurance policy interpretation, this Court has noted that only a very small percentage of policy holders "are actually cognizant of the provisions of their policies and many of them are ignorant of the names of the companies issuing the said policies . . . . [C]ourts, while zealous to uphold legal contracts . . . should not be slow to aid the confiding and the innocent."[73]

Referring to "artfully spun advertising," the dissenting judge in *Gaidon* would have held that Guardian's sales practices give rise to no cause of action even under the New York deceptive practices statute.[74] Under this view, Guardian is free of any liability because "[r]easonable consumers acting reasonably recognize sales pitches," and "*no reasonable person would believe* some sales promotion to be literally true."[75]

Compare Mississippi law in which the Mississippi Supreme Court, summarizes the law in that state as follows:

> What does an insurance company owe its policyholders

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[72] *Id.* (emphasis added).

[73] Ross-King-Walker, Inc. v. Henson, 672 So. 2d 1188, 1193 (Miss. 1996) (citing Crawley v. Am. Pub. Life Ins. Co., 603 So. 2d 835, 841 (Miss. 1992)) (holding it improper to place arbitrary cap on punitive damages at three times actual damages award).

[74] *Gaidon*, 725 N.E.2d at 350-51.

[75] *Id.* at 357 (emphasis added).

> and those it induces to become policyholders? First, simple, open honesty and fair dealing in taking reasonable steps to be certain that the insured is not being misled as to his coverage, but understands it . . . . The law of this state requires no more; neither will it tolerate less.[76]

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[76] *Crawley*, 603 So. 2d at 841 (reversing punitive damage summary judgment in favor of defendant-insurer, and concluding: "Shell games are for carnivals, not the insurance industry.").

APPENDIX 2

IN THE CHANCERY COURT OF THE SECOND
JUDICIAL DISTRICT
OF PANOLA COUNTY, MISSISSIPPI

GEORGE K. WALLS and ROSIE ANN WELLS,
Individually and on Behalf of all Others
Similarly Situated PLAINTIFFS

VS. CIVIL ACTION NO. B-99-07-272

USF&G INSURANCE COMPANY DEFENDANT
of MISSISSIPPI

ORDER

This case is before the Court on the Defendant's Motion to Dismiss. The Court has received and reviewed the following materials including all attachments thereto: Defendant's Motion to Dismiss, Defendant's Memorandum Brief in Support of Motion to Dismiss, Plaintiffs' Response to Defendant's Motion to Dismiss, and Defendant's Rebuttal Response in Support of Motion to Dismiss. The matter was set for hearing on October 8, 1999. All parties were represented by counsel at said hearing. Oral argument was had with the representatives of all parties participating. Having heard all arguments, having reviewed all written submissions, and having maturely considered all of the same, the Court does find that the motion to dismiss should be denied at this time.

The threshold issue before the Court on this motion is whether the Chancery Court's authority to certify class actions survived adoption of the Mississippi Rules of Civil Procedure.

The Court is of the opinion that adoption of the Mississippi Rules of Civil Procedure did not abolish the jurisdiction and authority of Mississippi Chancery Courts to provide substantive relief through the remedy of equitable class actions, and that in appropriate cases such actions remain viable today. The Court does not address at this time whether the facts of this particular case present an appropriate case for class action treatment. This issue will be addressed by the Court at the appropriate time. This Court does not believe, however, that by omitting Rule 23 from the Mississippi Rules of Civil Procedure the Mississippi Supreme Court intended to abolish the authority of the Chancery Courts of Mississippi to provide substantive relief through the ancient remedy of equitable class actions.

As the Mississippi Supreme Court pointed out in *Barrett v. Coullett*, 263 So. 2d 764, 765 (Miss. 1972), class suits were recognized in Mississippi as a matter of general equity jurisdiction prior to adoption of the Mississippi Rules of Civil Procedure. In *Leaf River Forest Products, Inc. v. Deakle*, 661 So. 2d 188 (Miss. 1995), the Court held that the authority of the Chancery Courts of Mississippi to grant substantive relief through its equitable procedural remedies was not altered by adoption of the new Rules of Civil Procedure effective January 1, 1982. This Court is of the opinion that the Mississippi Supreme Court did not intend by adoption of the Mississippi Rules of Civil Procedure to abolish the jurisdiction and authority of the Mississippi Chancery Courts to grant substantive relief in appropriate cases through the remedy of equitable class actions.

IT IS, THEREFORE, HEREBY ORDERED that the Motion to Dismiss filed by the Defendant, USF&G, is hereby denied, as provided in this Order, without prejudice to the Defendant contesting class certification on the facts of the particular case at bar upon the occasion of this Court addressing the issue of class certification, which issue will be addressed once the facts are developed and presented on a motion for class certification.

SO ORDERED and DECREED, this the ____ day of November, 1999.

HON. PERCY L. LYNCHARD, JR.
CHANCELLOR

MR. BALLARD: Thank you. Mr. Welch.

MR. WELCH: Well, I'm like Flip; I just do better if I get to stand up—and my best is not all that good necessarily. Madam reporter, do you need a rest after his talk because he—

AUDIENCE: He is the fastest talking guy in Batesville.

MR. WELCH: He talks faster than I do, and I can challenge the best of the court reporters. Interesting that I'm not here to debate that we should have class actions, and I'm not here to debate that we should not have class actions. I'm here to tell you from my perspective, not going to the merits of the *American Bankers* case, that what we've got now with joinder of cases cannot continue. And the reason I say that to you is that what we have now in the way joinder is allowed in the state of Mississippi is a quasi-class action procedure without any procedures in place to tell our trial judges who are not accustomed to dealing with these matters how to handle them. Now, I didn't make up the fact that we've got quasi-class action procedures. Where I got that notion was from the briefs that were filed by the appellees, the plaintiffs, and by the Mississippi Trial Lawyers Association as an amicus in the *American Bankers* case in which they very forthrightly argued that for the most part their clients' claims were not worth bringing one by one because the amount of money involved in them was too small for the lawyer to pursue them. Therefore, since they were *de minimis* type claims on the one hand, and we had no class action on the other hand that the plaintiff lawyers who filed those cases were entitled to fashion their own claims. And that, ladies and gentlemen, is not right.

If we are going to make our courts available to people—and they should be open and available to everyone—then they must be open and available to everyone in an orderly manner with their process. The words "due process" didn't just spring up someplace, and process doesn't have just some constitutional meaning. I listened with a great deal of interest and, frankly, a little disappointment at the first panel because I heard a lot more rhetoric in that panel than I'd hoped to hear this morning.

I tell you my perspective on this is not only as an individual, and I speak here today as an individual, but the organization of which I am president this year is the American Board of Trial Advocates, and so you will know where I am coming from in some of my remarks. The American Board of Trial Advocates is an organization of 5500 lawyers nationwide. It's a "by invitation only" organization. You have to have tried a minimum number of civil jury trials in the first chair, and you have to be accepted by seventy-five percent of the local executive committee of the chapter in your state or city and then by the national board of directors in order to be a member. Our sole, main goal, aside from education, is the preservation of the right to trial by jury. And that's not the preservation of the right for plaintiffs to be able to go and get a lot of money. It's not the preservation of a right for defendants, whether they be corporate or simply wealthy individuals, to avoid having a verdict rendered against them in a proper cause. It's not a right to insulate anybody from any kind of damages. It's a fundamental right that everyone of us in this room has to have when there is a dispute with another party, the right to have that dispute resolved if it is more than $25 in controversy—that's what the Constitution says in the Seventh Amendment—to have that controversy resolved by a jury of our peers. And that is an important right. It's a right that predates the amendment in which it appears in our Constitution by almost 500 years.

It's one of the most fundamental rights, and we are challenging that when we have a system that allows people to make up their own rules as they go along. And I submit to you that that is what has happened with the way joinder has been utilized in this state in the recent past. And it is what is going to be threatened if it continues to be utilized and be allowed to be utilized in that manner in the future because—and I realize that there are some former legislators in this room. What's going to happen is the damn legislature is going to get up in the middle of this. And the last thing the state of Mississippi needs to have happen to its justice system is to have the legislature go to Jackson and do anything about it.

One of my law partners, Larry Franck, is responsible for writing a law journal article back in the late '60s, early '70s that was genesis for our present Rules of Civil Procedure which are modeled on the Federal Rules. So, I say to you that—I'm not saying we need a class action procedure, but if we are going to have a joinder procedure that's going to allow any party to decide they need some kind of class action, therefore, they can file one—and you can use your minds and you could think of some circumstances in which the defendants could do exactly the same things—otherwise, defendants—we can't do that.

Now the argument in *American Bankers* and the argument that's advanced in favor of utilizing our liberal joinder rules is that it promotes judicial economy. Well, if you look at the description of the cases in the *American Bankers* case, you will see that those cases were filed in 1997. They have not been tried yet. I will confess to you right here and now that the reason those have not been tried is because obviously they have been delayed for at least a year and a half by an interlocutory appeal. But on the other hand, I have been representing a party in a case that was filed in Hinds County, Mississippi, in 1996—actually, a series of cases. Total of about 13,000 plaintiffs in those cases. Okay? No question in those cases that the common occurrence prong of Rule 20 was met. There was an explosion of a railcar of a dangerous substance in Bogalusa, Louisiana. There was a release of toxic fumes into the air, and there were a number of people who claimed that they were injured by having breathed those fumes. Has judicial economy been promoted by the joinder of 13,000 people in those claims? I will let you judge for yourself.

The facts are these. There have been no interlocutory appeals in those cases except one that the plaintiffs took when during the trial the judge ruled that they must each pay the $95 filing fee because he had made a mistake when he denied a defense motion about that at the early stage of the case. The number of plaintiffs has now been whittled down to about 4000 by attrition. A number were thrown out because they refused to respond to discovery. Of the initial 13,000 and the 4000 remaining, almost two years ago we tried the first twenty trial plaintiffs. It was found that the defendants in the case were negligent and that their negligence was the proximate cause of the accident. It was also found that none of those twenty trial plaintiffs suffered any injury. The next twenty trial plaintiffs in these properly joined actions under Rule 20 are set for trial in April 2002.

So, I suggest to you that Rule 20, when people use it to say that it produces and promotes judicial economy, I would suggest to you that the factual scenario I've just laid out is something other than judicial economy. We might ask ourselves how many of those soon to be forty people and others would have had their cases finally disposed of by now had they filed single cases. Because one of the problems in the state of Mississippi under our substantive law is that the results of the first twenty cases that were tried two years ago are not *res judicata* as to the remaining cases. There is not collateral estoppel as to those remaining cases, so those twenty trials didn't make everything judicially economical by deciding what ought to happen to the rest of them. So I'm not here to tell you that we ought to have a class action—how am I doing on time?

MR. BALLARD: Two and a half minutes.

MR. WELCH: Okay. But I do suggest to you that if we are going to have joinder on the scale we've got now, there must at least be some procedures adopted so that the courts can exercise their discretion that our Supreme Court recognized in the *American Bankers* case to come up with procedures to determine if people who—which groups of people, if there are different groups, have the same occurrence or the same set of transactions.

The class action argument that Flip is going to make in a couple of weeks is interesting. You will also—you may also be interested to know that there is going to be argued before the Supreme Court of Mississippi right now on December 5th, and our arguments in the Supreme Court are available on web cam. We had a case that was filed in the Chancery Court of Jones County, Mississippi, as an equitable class action. Actually it was first filed just as a suit for punitive damages, and then the plaintiffs' lawyers were allowed to amend the complaint to seek class relief. We sought dismissal of that. The chancellor denied our motion to dismiss and refused to determine whether there was or was not to be a class until all the discovery had been done to determine whether there were enough people, which sort of defeated the whole purpose, I think. He also refused to either grant or deny our motion for interlocutory appeals. So we took a direct interlocutory appeal or sought one from the Supreme Court, which I am happy to say granted the interlocutory appeal and stayed the chancellor's action. And we will argue in the Supreme Court of Mississippi on December 5th, of whether and to what extent we have an equitable class action or any other kind of class action right now.

Some of the other things that are mentioned in our headnote here on this panel are the ninety-day rule for discovery. For those of you who are from out of state, that rule says that all discovery will be complete as to—within ninety days of the filing of the answer by the applicable defendant. All I will say to you or suggest to you about the ninety-day rule is it is like—a lot like some of our other state and federal rules that quite frankly, I think, is written to accommodate the lowest common denominator and make those who would not otherwise try the lawsuit in a proper fashion, move them along, and it works disservice in complicated cases. I think that's it. Thank you very much.

MR. BALLARD: Thank you. Mr. Shannon.

MR. SHANNON: I just wanted to address a few things that I had heard on the first panel. First of all, I practice—I am the only one here that I know that is practicing in the 22nd Judicial District. It's Copiah, Claiborne and Jefferson. It was created in 1994 by the legislature—it's a new district created at the same time they created one other district. I've done work in Jefferson County before all this mass tort litigation. I've done criminal work there. You know, I've been appointed on criminal cases. So, I have been there; I have practiced there; and I have done the work where you didn't get paid a whole lot of money. I've heard words used "war," "extortion" in that first panel. First of all, I have to agree with what Scotty had to say. The system works in Mississippi. You know, most of the lawyers here know each other; we practice together. I am not going to get into a fight with Scotty about something because I will be coming back and seeing him again. Most lawyers get along here. I do plaintiffs' work and defense work. You will find a lot of Mississippi lawyers doing plaintiffs' work and defense work.

I practice in a small-town. Mississippi practice is mostly a small-town practice. You have Jackson, Gulfport, Tupelo, Hattiesburg. But most lawyers are doing small town practice. They are doing—they would like to have a tort. They would like to have—you know, they are doing criminal work, criminal appointments. They are doing the wills. They are doing the title work. They are doing those kinds of things.

I remember years back when Grady had those ads put on about the Mississippi lawyer coming into the coffee shop. Maybe you all remember that. Talking to "Joe Blow" about his will or his title opinion. That is the way most Mississippi practitioners practice. The system works. And let me tell you how it works. You know, we have been hearing about these punitive damages. The system works because the Supreme Court modified the rules; they adopted—which was essentially the Florida rule. If you have punitive damages, you know, you can put up—if it is over a hundred million, you put up your hundred million dollar bond. You know, there is no extortion on punitive damages. The rules have recently been modified or are in the process. Y'all have seen the Supreme Court come out with these—with this administrative order. You know, you have to try ninety percent on all civil cases within a year. You know, they are working on these things. You have seen the proposed judicial canons. Have y'all seen that? You know, the thing is there is change going on. But what I object to is outsiders coming into Mississippi telling us what we need to be doing because the system does work.

The system has some problems as Scotty pointed out, but leave it to the legal community and the judiciary to make the changes. You know, don't be pouring money in here—the Chamber shouldn't be coming in here pouring all this money into judicial elections. You know, I just think that is wrong. We have been unfairly targeted, I believe, by the national press on this tort reform. There is—there are a lot of verdicts—large verdicts all over the country. You don't see them singled out.

Jefferson County has been singled out. In the brief, the amicus brief before the U.S. Supreme court, they cited a—Jerry Mitchell's article in the *Clarion Ledger* that at least nineteen Jefferson County damage awards have exceeded $9 million and—and six have exceeded $100 million. I am quoting it from the brief. That is completely untrue. There are two substantial verdicts in Jefferson County. An asbestos case, the *Cosi* case, $48 million, compensatory. It settled before it went to the punitive phase. The other was the Fen-phen case, $150 million in compensatory. It settled before it went to the punitive phase. Those are the only two verdicts that I know of, and like I say, I practice over there. There have been numerous higher awards throughout the state of Mississippi. The $480 million verdict in Hinds County earlier this year. You know, I believe, and this is my belief, that a lot of these counties where the majority of the people are black have been unduly targeted. You know, you don't see anything in the news or the *National Law Journal* about Smith County. There was a $200 million verdict against General Motors earlier this year. Compensatory. Was that publicized to the national press? No. Copiah County, predominately a white county. Earlier this year, I got a judgment for $77.5 million, $2.5 million compensatory, $75 million punitive. Was that publicized to the national press? No.

So what I think is we have a lot of misinformation out there. And I have heard a lot of misinformation today about Jefferson County. What you need to understand about Jefferson County is there is a university located in that county. Alcorn State University is—adjoins Claiborne and Jefferson County. A lot of people in Jefferson County work there. They have degrees from Alcorn State University. They have—you know, they are well educated. They are not impoverished and poverty-stricken. So, again that is more misinformation. The verdicts—I've talked about that. Defense verdicts—have there been any defense verdicts? Well, there was—recently this *Owens-Corning* case. I think Mr. Clark—or somebody kind of blew this off that this was asbestos versus tobacco. Well, if you were there and you saw how worried tobacco was about that thing, you would think differently. But the judge granted a summary judgment on—it is a recoupment case. Three billion dollars. Owens-Corning poured a lot of money into this case, but as a recoupment case. And the system worked there. Whether Tom Tardy agrees with me or not. But the point is, you know, the system is working.

These Fox News, *National Law Journal*, *New York Times*—21,000 plaintiffs in Jefferson County. Where did that come from? My Propulsid case. There was a motion for change of venue from Jefferson County in my Propulsid case. Butler Snow [O'Mara, Stevens & Cannada], Scotty's firm, did an excellent job. You know, they put together this—I mean, a brief that high. You know, here I am trying to get ready for trial, and I have got a change for venue motion that high we've got to respond to. But the point being that the 21,000 plaintiffs—a lot of these were out-of-state asbestos plaintiffs. Texas plaintiffs. And so that's where a lot of these numbers come from. But they are being mischaracterized.

The other thing, Judge Pickard is enforcing the Texas rule; whether he knows it or not, he is enforcing the Texas rule. Unless you are a plaintiff from Jefferson, Claiborne, Copiah, you will not be in any mass tort suit in the 22nd Judicial District. He's been doing this. I think, Scotty, wouldn't you agree that right now you just file a motion for severance if it is a non-county plaintiff; is that correct?

MR. WELCH: If we can ever find out real quick—I got one that's coming up.

MR. SHANNON: Well, I have seen a number of them zapped out of there.

MR. WELCH: But he has done that—

MR. SHANNON: Yeah. There has been a lot of adverse publicity about Jefferson County. You know, here is something that a client brought to me. It's INC Magazine; it's a chamber ad. "Do you want the future of your business decided in this courthouse?" Well, it's the Jefferson County Courthouse. That being said simply to show you that there's a lot of pros and cons in the—I think that Jefferson County is being unduly portrayed in the media. My case, the Propulsid case, was moved to Claiborne County. I didn't particularly like that. But it was moved to Claiborne County. And up until that time, there had not been a history of high verdicts in Claiborne County. There had been a General Motors case where there was a defense verdict, and we thought we presented what was a good case and got a good verdict. Now, do I expect a $100 million verdict to stand? No. I expect Judge Pickard to—you know, there is going to be a lot of that sliced back. And it's going to be appealed to the Supreme Court. But the point is, the system works. And it is working, and it needs some modification. And that's what I think the solution is. That the lawyers and the judges have got to work together towards that. And I think an effort's now; you have seen the Supreme Court is doing some things. And I think it is going to go a long ways towards that.

But Mississippi is being singled out for whatever reason. And I think maybe the state has been—you know, too much attention has been paid to us when there are a lot of things going on elsewhere. This Propulsid case. I never knew it would get all of the publicity it got nationally. But there is litigation going on in Texas; there is litigation going on in New Jersey; there is litigation going on in California and Illinois on this Propulsid. There is an MDL in New Orleans. It is moving along. The point is, there are Propulsid suits going on all over the country, and I just happened to be the first one to get it to trial. And benefitted from a lot of publicity. Or did not benefit from a lot of publicity, whichever way you want to look at it.

Let me discuss a few things that were on the agenda. One is this ninety-day discovery rule. That is an interesting rule. You know, you've got ninety days from service of an answer by defendant within which to conduct your the discovery. There is a case that just came out of our Supreme Court on October 18, 2001; it's *Tatum v. Berantine* where the Supreme Court affirmed the trial judge who denied the discovery request after the ninety days had past. I think this rule is antiquated and does not fit in with our practice. It makes all kinds of problems for the plaintiff as well as the defense. If you are on the plaintiff's side, what if your client has now reached maximum medical recovery. What if you forgot about the ninety-day rule and don't do any discovery? If you are on the defense side, you have to cram everything in. So, I think the ninety-day discovery rule needs to be looked at and modified by the Supreme Court particularly in conjunction with this administrative order on the civil rules. But these are the kinds of things that Mississippi lawyers can take care of.

Rule 20. My experience has been that it functions pretty well. Judge Kathy Jackson, I believe from the Coast, is going to be one of the speakers here. But she's had a lot of experiences with Rule 20—a lot of asbestos litigation on the Coast. You know, and it does help the judges in managing their docket. Now whether it needs to be changed or not, whether we need to have a venue statute like Texas, I disagree with that. But I think that that's something that the plaintiff's and the defense bar are going to have to look at.

MR. BALLARD: You have reached your time limit.

MR. SHANNON: These are some things that I just wanted to bring to your attention from what I've heard. But again I just want to emphasize what it's going to take is the Mississippi lawyers working together. You know, if we talk about extortion, we talk about war, it is not that. You know, America is one country that—we have been through a lot of problems lately, but—I was in New York when they were going through their election. It was a close election, but the system worked, and, likewise, the system will work here in Mississippi. Thank you.

ISSUES OF MISSISSIPPI CIVIL PROCEDURE

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"90-Day" Rule, Joinder, Venue, Forum-Shopping, Appeal Bond Requirements, Judicial Discretion

1. The "90-day" Discovery Rule in Mississippi U.C.C.C.R. 4.04(A)
   - "All discovery *must* be completed within ninety days from service of an answer by the applicable defendant.
   - Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension."
2. Application of the Rule:
   - *Tatum v. Barrentine*, 1999-CA-01775-SCT, 797 So. 2d 223 (Miss. 2001).
   - ISSUE: Whether the circuit court erred in refusing to allow discovery to be conducted outside of the 90-day period prescribed by U.C.C.C.R. 4.04(A).
3. Application of the Rule:
   - *Tatum v. Barrentine*
   - FACTS: The Estate made its first request for admissions 169 calendar days after filing of the complaint.
   - The trial court found that the Estate failed to comply with U.C.C.C.R. 4.04(A), and denied a motion to compel.

4. Application of the Rule:
   - *Tatum v. Barrentine*
   - HELD: It is within the trial court's discretion to apply U.C.C.C.R. 4.04(A) and the trial court will not be overturned unless there is an abuse of discretion.
5. Effect of the Rule:
   - Is there a scenario in which the party could be prejudiced by strictly applying 4.04(A)?
   - Answer: Yes.
   - Complex litigation cases
   - Cases in which the Plaintiff has not reached maximum medical improvement but the statute of limitations is approaching
6. Effect on Case Progression:
   - Will the request of a discovery conference be necessary to lengthen the discovery period?
   - Miss. R. Civ. P. 26(c) governs the discovery process with Discovery Conferences.
7. Effect on Judicial Economy:
   - Rule 26(c): "At *any* time after the commencement of the action, the court *may* hold a conference on the subject of discovery, and *shall* do so if requested by any party."
   - But does *every* case need a Discovery Conference and Case Management Order—even the simplest ones—to prevent application of Rule 4.04(A)?
8. Effect on Judicial Economy:
   - Strict Application in every case will overburden trial court calendars with discovery conferences, motions to compel, and motions for extensions.
9. Effect on Lawyers:
   - Strict Application of the Rule will result in added time spent on every case—even the uncomplicated ones—which takes away time from the complex ones with 90-day discovery deadlines!!
10. Effect on Clients:
    - The ball gets dropped and the client suffers.
    - Then, the lawyer suffers when clients file malpractice claims against them.

11. Miss. R. Civ. P. 20: Permissive Joinder of Parties
    - "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action . . . ."
12. Purpose of Rule 20:
    - "To promote trial convenience and expedite the final determination of disputes, thereby preventing multiple law suits." *Official Comment.*
13. Purpose of Rule 20:
    - "Rule 20(a) simply establishes a procedure under which several parties' demands arising out the same litigable event may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of the evidence relating to facts common to more than one demand for relief would entail." *Official Comment.*
14. Rule 20 Applied
    - *American Bankers v. Alexander*, 98-IA-00046-SCT, 818 So. 2d 1073 (Miss. 2001).
    - The Mississippi Supreme Court held the joinder of 1,371 borrowers as plaintiffs permissible in one suit because each borrower alleged the very same claims involving the same insurance policies, and the cases differed only in the dollar amount of the charge.
15. Joinder is within *Discretion* of Trial Court
    - Review standard is an abuse of discretion.
    - Mississippi needs Rule 20 joinder because we don't have Rule 23 class actions.
    - Judicial economy is served by these joinders.
16. *American Bankers Ins. Co. of Florida v. Belinda Alexander, et al.,* No. 00-1826, Supreme Court of the United States
    - American Bankers files Petition for Writ of Certiorari to the Supreme Court of Mississippi
    - U.S. Chamber of Commerce files motion for leave to file brief in support of Petitioner as *Amicus Curiae* claiming, *inter alia*, Due Process violations.

17. *American Bankers v. Alexander:*
    - Petition for Writ of Certiorari denied October 1, 2001.
    - American Bankers Ins. Co. v. Alexander, 122 S. Ct. 324, 2001 WL 649486, 69 USLW 3780, 70 USLW 3037, 70 USLW 3205, 70 WSLW 3245 (U.S. Miss. Oct. 1, 2001).
18. Venue
    - Miss. Code. Ann. § 11-11-3 (1972)
    - Venue is proper:
    - In the county in which the defendant or any of them may be found;
    - Where the cause of action may occur or accrue;
    - County in which a domestic corporation is domiciled or where the cause of action may occur or accrue.
19. Venue for Nonresident Defendants:
    - Miss. Code Ann. § 11-11-11 (1972):
    - "All civil actions for the recovery of damages against a nonresident or the representative of the nonresident in the state of Mississippi may be commenced in the *county in which the action accrued* or *where the plaintiff then resides* or is domiciled."
20. Forum-Shopping in Mississippi:
    - Essentially, the filing of multiple plaintiffs lawsuits, resident and nonresident, in a single county in which only one plaintiff actually resides—i.e. Jefferson County, Mississippi, the "Mecca of tort litigation."
    - Jefferson County Circuit Judge Pickard no longer allows nonresident plaintiffs to file lawsuits in Jefferson County.
21. Appeal Bond Requirements:
    - Defendants must put up a bond for 100% of the compensatory damages;
    - Also, up to $100 million in punitive damages
    - 8% per annum interest charged on both compensatory and punitive damages
    - 15% penalty assessed if appeal is unsuccessful.
22. Judicial Discretion:
    - The "Jefferson County Experience"
    - Judge Pickard, in his discretion, has tightened permissive joinders to no longer all out-of-state plaintiffs to join in with local resident plaintiffs

MR. BALLARD: Thank you. Justice Carlson.

JUSTICE CARLSON: Flip and Scotty and Jim chose to stand because they are courtroom lawyers, and I'm just ten days removed from the circuit court bench where I served for roughly nineteen years. So I'm used to sitting. So, I will just remain seated. Although I do recall that a few years ago when I was up in Desoto County trying a case and presiding over a trial and had a sore throat, could not talk very loudly, and in the main courtroom there in Desoto County, the bench is pretty far removed from the jury panel, so I chose to go out and make sure that I could be heard during court's voir dire and got at the rail like the lawyers and walked around and conducted the voir dire and enjoyed it. Some of the lawyers up there said I probably did my best voir dire that day. But I am pleased to be here.

I will tell you this story. Most of you know the Chief Justice was scheduled to be here today, Chief Justice Pittman. And he called me into—actually he came down to my office Tuesday of this week, and with a long face, and closed the door, and said he really needed to talk to me about something. And I'm thinking for a minute, well, can the Chief Justice fire? I had been on the job just a few days, and I couldn't imagine what had happened. But he said, "I really need to impose upon you. I really need for you to go to Oxford, to Ole Miss, to the Law School to represent the court and to be on the panel." And he mentioned that he did have pressing business, and he does. He told me what he had, and I can assure you that today, as we speak, that he is in Jackson taking care of court business, judiciary business for the state, which is very critical. But he went on to say that I know I am imposing on you. But I need for you to go up there, go to the dinner on Thursday evening. I said Chief, "You are asking me to go home a day early, on Thursday, and I promise you, you're not imposing on me." So, I'm happy to be here; enjoyed the dinner last night, and enjoyed being here today. I know it was stated earlier, I believe by Judge Mills when he made his remarks, regarding the coalition if you will. And I commend all of you for coming together to discuss these very important issues.

Just a couple of other things before I make my remarks. You know as a judge, especially as a trial judge in dealing with juries, I have always been concerned, Justice Anderson, former Circuit Judge, about the perception that the—as far as how the judge was perceived or was the judge doing anything or saying anything that might influence the jury and go one way or the other. Judge Sanders here, Judge Vollor, you know that. So when we were seated I really wanted to get square in the middle of this table. And my friend, Flip Phillips got there. So I couldn't—so I am way down here on the end, so hopefully you won't align me with one side or the other in what I have to say. And really, probably what I say will be indeed more toward my perception and experience as a trial judge for some nineteen years versus my ten days of experience as a Supreme Court Justice. But I do have some thoughts on what all is being discussed here today. One thing that I mentioned to the Chief that I would talk to you about very briefly, and I think it is in tune with what is being discussed here today, and that is, time standards. All of you are aware of what is before the Court. I have read the stack of letters that has come in, pro and con, mostly con on time standards, and again keep in mind that as a circuit judge just a few days ago, the latter part of October when the judges conference in Jackson was met and each conference the circuit, chancery, and county court judges did in fact vote on whether or not to basically approve or go along with the time standards as proposed by the Supreme Court. And I can tell you that it was not a unanimous vote. But the time standards were adopted and accepted by the—each section, each conference of the trial judges again by way of circuit, chancery, and county. You might know and are probably aware of the fact that as to civil litigation that according to the time standards that it should be—the case is to be disposed of within the eighteen months from filing of the complaint.

Now, I can say to you that when the time standards were first proposed a few months ago, all of the conferences were very much opposed. I know we're not here about criminal work, but now the time standards would provide for a case being disposed of, a felony case, within 270 days from the arraignment much better than 180 days from and after indictment is how it was proposed, and certainly the court had no control over the running of the time and even when a defendant might be taken into custody. But the time standards are perhaps more realistic, and I can say to you probably will be voted on by the Supreme Court in the near future, and they would be advisory only.

Now, something else before the court, and we are in the period of time when I hope you are considering responding, and I think—I don't have the order before me—the order was entered before I went on the court—on the Supreme Court, but regarding the Code of Judicial Conduct. Somebody may be able to correct me. As I recall, I believe the order provided for comments up until roughly December 10th. So, if you have not done so, I would certainly invite each of you to consider responding to the code—the proposed Code of Judicial Conduct. I certainly would not in any way attempt to infer by anything that I say as to how I would consider the code or vote on the code as proposed. But at least you ought to be able to be aware of the fact, and most of you are, probably all of you are aware of the fact, that at least one provision of the proposed code would call for a—any party to have the right of a peremptory challenge on a judge. So, be aware of that if you are not. Certainly the code addresses campaign financing.

There are many other provisions in there that you might want to look at because it appears that it would certainly be, for lack of a better phrase, a pretty drastic change from our current Code of Judicial Conduct. So, those two matters are certainly before the court for consideration, and, again, I believe the time standards would come up first as far as court consideration based on the fact that we are still in that response period for the Code of Judicial Conduct. Now, I agree and I think that it's squarely before the court—will be before the court, regarding the issue of Rule 20 joinder. I think it's there and the court, as I see it, will certainly have to deal with it head-on. There's been discussion here in relation to Rule 20 joinder regarding the Rule 23 class certification or class action or the lack of the state Rule 23. These rules—as you all know, the Rules of Civil Procedure were judicially enacted, not legislatively enacted, but judicially enacted by our State Supreme

Court under its inherent power and authority coming from *Newell v. State*—the rules were enacted judicially back in 1982. And as an aside, I might mention to you that that was the year I got elected to the circuit bench. I went out to the National Judicial College at Reno in October of that year, and one of the first classes I attended was on the inherent power and authority of the court. And that action vouch by our State Supreme Court was the highlight of that class—the fact that our State Supreme Court had taken on the enactment judicially of the Rules of Civil Procedure.

MR. BALLARD: You got two minutes.

JUDGE CARLSON: Sir? Two minutes. Okay. So certainly that somewhere along the way possibly could be considered by the court. I don't know. I don't know if the court will consider Rule 23, but some of the other speakers here have mentioned that in conjunction with Rule 20 joinder. So certainly that is, I think, something that should be discussed here today. I really don't have anything else to say at this point. I think the other points have been covered. I know later on today punitive damages will be discussed. That was something that was thrown out to me earlier this week as perhaps a topic of discussion. I know we've got a panel on punitive damages. A lot of talk out there on whether or not to put a cap on punitive damages and so forth, so certainly that is a good discussion here today. And again, I commend everybody for being here and, if you will, both sides of the aisle coming together and discussing all these very critical issues to this state.

MR. BALLARD: Well, now we've got the Jerry Springer portion of the program. Unlike the first time through, I would like everybody to identify themselves when they have questions just so we can kind of keep it all in order. So let's open it up to questions.

MR. LANGSTON: I am Shane Langston. I have a question for Mr. Untereiner. It concerns your comment that you made about the *Choctaw Maid* case. And correct me if I am wrong, but as you know from reading the case, the issue's involving the hedonic damages and wrongful death contest. That is a creation of statute. The legislature creates that. And as you saw when you read the case, [Miss. Code Ann. §] 11-7-13 provides that in a wrongful death case damages shall include all damages of every kind and nature. So if we just assume that every kind and nature means hedonic damages as well, are you advocating that our judiciary in particular the Mississippi Supreme Court, should exercise some sort of judicial activism to modify that legislative creation and to change it? Or don't you think it is better for the legislature?

MR. UNTEREINER: I wasn't taking a position on the meaning of that Mississippi statute with my comments, and, I don't know—I think you could make lots of different arguments about what that language means. I am not sure it is so clear. But that is not—my principal position that I was trying to address in my comments was the admissibility of expert testimony—a particular kind of expert testimony which I think is grossly unreliable and the upholding of that kind of testimony to show the amount of hedonic damages in the earlier case. And so, you know, I think it is a fair point that you make, and I think it is a debatable point. I'm not taking a position on that.

MR. BALLARD: Anybody else want to wade in on that?

MR. WELCH: I would just say, Shane, I looked at that opinion again last night after you and I talked about it at dinner. I think that certainly the wrongful death statute is broad as far as allowing recovering all damages that the decedent could have recovered had he or she lived, and I think that the court in the *Choctaw Maid* case left an opening there that suggested that if there is proof in the case that the decedent survived the accident for some period of time and had some awareness of his or her circumstances that there might not be a foreclosure for hedonic damages, and, of course, I think what that does suggest is that in a personal injury case there might be a need for some awareness of what the individual has lost. So I am not sure they have shut it off quite as completely as it may look at first blush in that case.

DR. MERIDETH: I am David Merideth. I have been practicing medicine in Mississippi for fifteen years before jumping into this business with y'all. I thought of one question when Mr. Joyce commented earlier. He said that a lot of obstetricians are having to go out and practice when their insurance is skyrocketing. My question is for the defense side. And Mr. Joyce, if he wants to comment which I pose as a (INAUDIBLE) hypothetical question (INAUDIBLE) tort reform, but what I think should be one. For example, your wife is pregnant and you are expecting your first child. You go to the hospital at midnight on a Saturday night, and the nurse recognizes that there is some kind of a problem. She telephones the obstetrician who's at home who errs on the side of convenience and comfort rather than caution and does not come to the hospital. And as a consequence your child or your wife is injured catastrophically. When that happens, are you still going to (INAUDIBLE) go out and argue for stronger tort reform with that when it happened to you personally.

MR. BALLARD: Anybody.

MR. WELCH: First of all, I've got to tell you, I am not sure how strongly I am arguing for tort reform. I am looking at what I consider to be some egregious results in a few particular cases that we have talked about, I reckon I've got the distinction here that members of my law firm were in the Fen-phen case that has been discussed. We've had the Propulsid case that has been discussed, and we have defended one of the parties in the $150 million case out of Holmes County. And I have taken my own licks years before all this stuff got started. I don't know—you know, the extent to which people can protect themselves against consequences of their conduct by having insurance available, I mean that's something—I don't know how long you have been out of medicine and into law, but I will tell you that the lawyers face the very same dilemma. And in many circumstances our insurance premiums have gone up. We are all just as susceptible to being sued today as doctors. And we have not done nearly so well about protecting ourselves. We have a longer statute of limitations insofar as lawyers are concerned. There is no requirement that somebody has got to have an independent professional judgment that I committed malpractice before somebody can sue me for that. So, you know, a lot of these—I understand your hypothetical, and, you know, the fact of life is that a lot of our view of all of these things depends on whose ox is getting gored. When it is mine or yours, we may look at this philosophical thing a whole lot differently than we do when we are looking at it in the abstract. I can promise you I have got clients who do. They held one view about how some things ought to work in certain hypothetical situations, and when they find themselves the subject of the hypothesis, the view sometimes changes.

QUESTION: My comment is (INAUDIBLE). Mr. Joyce is going to come down here from Maryland and say obstetricians are going to have to go out of business yet when something like this happens to him, he's going to be I think—

MR. JOYCE: Can I speak for myself since you seem to be doing it for me.

MR. WELCH: Let's not—we are all civil down here now—

MR. JOYCE: No, no. I am not—but I would like to respond. First of all, your hypothetical (INAUDIBLE)—think that they should be held up. I don't dispute that. Nothing I said suggested that. But what we have seen is—I am not coming here from Maryland telling you I am going to (Inaudible) the Mississippi Medical Association. That's what they told us. And our concern, from a positive standpoint, we do this across the country, is that certain specialties are particularly hard hit. And the question that we are putting on the table is, are you better off (INAUDIBLE) because there is no one even to take that call. If that doctor does wrong, then there should be a consequence. I am not denying that.

And as for my personal experience, I am glad I didn't go through that. My two children were healthy when they were born. But how would I respond? I don't know. I can't say that because it is a hypothetical. But another thing that we would point out is that a potential obstacle could be lack of a Good Samaritan statute in some particular instance. The system, doctor, may feel less reluctant to help in a particular situation like that. As far as complicated (INAUDIBLE) absolutely that should be done. We have no dispute about that.

QUESTION: I will refer you to the medical association of insurance company website that proudly presents that last year they won ten of their eleven trials that they tried their appeals, they don't lose.

MR. JOYCE: Well, you can argue with them about it. I am accounting for the arguments of the facts that are not the facts that I brought from Maryland.

MR. BALLARD: Thank you. Another question. Anybody want to respond to any of our panel. Another question?

MR. SEALE: I am Steve Seale. I am a Washington D.C. lawyer, but I am also a Mississippi lawyer from Hattiesburg. (INAUDIBLE) We are all here—I am here from Mississippi, and I am also here from Washington representing clients here. We are all here—we are talking about oxes to be gored. We are all here representing a point of view generally based on the clients we represent as lawyers. Someone said here earlier that what we ought to do is not leave it to the legislature and let the court make the decisions. I don't know if that is true. I used to be a part of the legislature here too, and although I have a lot of disdain for some of the actions that we took and the way we took them, I think that it works both ways. There is a growth in the roles the judiciary plays and there are roles that the legislature plays. There are roles that the lawyer plays. I don't know a lot of the defense lawyers that are (INAUDIBLE). You know why? Because their business interests are going to be affected.

MR. WELCH: Is that a question?

MR. SEALE: No, that was a statement.

MR. WELCH: Okay.

MR. BALLARD: Any response?

MR. WELCH: No.

QUESTION: Well, I am Bill Jones from Jackson, and I wanted to ask a question. The peremptory challenge—

MR. WELCH: Could you speak up, Bill?

MR: JONES: —the peremptory—you just can't hear, Scotty.

MR. WELCH: It may be.

MR. JONES: How does that work? Because it seems to me that you'd have the same ones getting bumped every time, and they might just retire.

JUSTICE CARLSON: Again, as a circuit judge, Bill, back in October when we were discussing this at the judges' conference that's really the side that was taken or at least looking at it and it was all—like we have said today, you know, we are dealing with something in the abstract; it has not happened, and we are trying to conceive all of the possibilities out there if it were enacted, but that is one concern that came up amongst the circuit judges anyway, and that is that maybe some judges would be bumped all the time. You'd have a judge elected from his or her district who might not be able to hear many cases in that district. And as the rule is written, again, depending on how it might be applied, it appears that every party in the litigation would have at least—would have one strike, so that if you had in civil litigation say five or six defendants and maybe multiple plaintiffs—every party gets a strike. How long do we go before the case finally goes to trial after everybody bumps a judge? So it's an interesting concept. One that as I recall in reading out to the side of the proposed code it would state whether or not it was identical or similar to the current code and if other sources were used—what source was—as I recall on this, the source was the—one source was—the only source, California.

MR. BALLARD: What would the criteria be? For a peremptory challenge?

JUSTICE CARLSON: Membership—I don't want you to, Judge. I mean, just like a juror on peremptory strike. You're off. That would be the case with the judge. Judge, you're off the case. No reason given.

MR. SHANNON: Where it would have a lot of effect is in the criminal arena. You know, if you have a judge that gives hard sentences, he is going to get bumped every time in the hopes to get somebody else that will give you a lighter sentence. And it is going to create chaos. Judge Pickard likes it because he will get to hunt and fish a lot.

MR. BALLARD: I think the judges would like that. To be able to hand off these cases. Yes, sir.

QUESTION: Yes, I am John Cavanaugh from San Francisco. This question is for Mr. Shannon. You seem to find (INAUDIBLE) objection of hearing words like war and extortion—

MR. SHANNON: Right.

MR. CAVANAUGH: —on the defense side.

MR. SHANNON: No, war was used by the plaintiffs' side.

MR. CAVANAUGH: Okay.

MR. SHANNON: Extortion used by the defense side.

MR. CAVANAUGH: Don't you feel used (INAUDIBLE) in the way it was used earlier. (INAUDIBLE) all objectionable?

MR. SHANNON: Well, what I am pointing out to you is that the national media has targeted a black jurisdiction. Y'all have been talking about the asbestos case. That's Holmes County, majority black county. Now who's talked about Smith County? Majority white county, $200 million compensatory verdict against General Motors. Who's talked about Copiah County? I got—Flip and I got a $32 million verdict there. I got a $77.5 million this year. Who has publicized that?

MR. CAVANAUGH: But you are saying that's the reason—is probably because of that county.

MR. SHANNON: I think that they have been targeted for whatever reason. You know, rural and black. That's my personal opinion now. Okay? Because I practice there; I know the people there. They're good people; they're educated people; they aren't any different from anyplace else. And they have been categorized as impoverished, and you know, the lottery and all this other stuff you hear. You know—you know, a good defense lawyer, and people think I'm crazy, can go there and win a case. I represent tobacco there. You know, we've got these tobacco trials coming up. There is a possibility that we may win them. You know. It's not unlikely that you won't, but if you don't try, you'll never know. So, you know, I think that, you know, that they've been unduly targeted and unduly characterized, and I'm blaming the national media. Okay? Now where they got their information, I don't know, but it is a lot of misinformation.

MR. BALLARD: I can answer that. On the poverty issue and the education issue came from the state of Mississippi. The statistics that are kept—

MR. SHANNON: Uh-huh.

MR. BALLARD: —and that's what they say. Yes, sir.

MR. WELCH: I will that say that although George Cochran apparently doesn't ever watch Fox News, I had about an hour interview with Fox News in relation to that same article; I think maybe five seconds of it did not go directly to the cutting room floor. But I was specifically asked in that interview about the racial situation; I was asked about the fact of jurors being uneducated; and I told the interviewers at that time, and I'll tell you here now, that the reason you can find for most large verdicts, regardless of the demographics, is that you have people who respond to arguments based on emotion rather than on law and good hard facts. And if I were a plaintiff's lawyer, those are the jurors I would look for. And I am a defense lawyer, and those are the jurors I try to keep off my panel. I try to get businessmen and engineers and people like that on my panel. I do forum selection. That's part of our topic here. When I remove a case from federal court to get it out of Jefferson County, I am doing forum shopping. It has been around a long time and we—something was said about historical perspective. Shane made the point earlier about C.T. Corporation system moving its office to Rankin County because it's heaven for defendants; thirty-seven years Rankin County was to the state of Mississippi what Jefferson and Holmes has the reputation for being now. That was the last place as a defense lawyer you wanted to go—right across the river from where I practice law. It was horrible. It has changed now. Demographics have changed. And over time who knows what will happen to the demographics in these counties. Unfortunately, I don't think we can wait on demographics.

MR. SHANNON: One of the comments I want to make, you know, of banks and drugs. Mrs. Bankston is a plaintiff and has filed suit against United Mississippi Bank whom I am defending and is asking for punitive damages.

MR. WILCOX: I am Dick Wilcox, and I am from here in Mississippi. My question is for Mr. Shannon. I picked up a conflict that I didn't understand. You are saying that it is appropriate for people from out of state to be in Mississippi courts?

MR. SHANNON: No. I disagree with the *American Bankers* opinion on that. I would agree with Justice Waller in his minority opinion that unless they have some nexus with Mississippi, they shouldn't be in, you know, in our courts and in these counties. That's my opinion.

MR. WILCOX: Okay. Well, I thought I understood you to say—

MR. SHANNON: No. I agree with the *American Bankers* but for that.

MR. CLARK: Okay. Mr. Shannon, I am David Clark. Do you think, Jim, that any targeting of those counties might have something to do with the fact that personal injury lawyers have targeted those counties and chosen those counties for filing—

MR. SHANNON: Yeah. I would have to agree with that. I mean, when you have 21,000 plaintiffs, you know, in a county with 8600, you know, something is out of kilter here. But, again, most of those are out of state. These Texas lawyers coming in, you know, in these asbestos cases. And I guess I am jealous because I didn't get some of the money. But the fact of the matter is, I don't necessarily agree with that. You know, the Texas lawyers coming in bringing these out of state plaintiffs. I do not agree with that. But you are right it has been targeted because—you know, it has been a dumping ground for tort suits. But what's—what is hard for me to understand is now Judge Pickard has taken—you know, he's—he's and Judge Landium were on the *American Bankers* case, and now he is taking the opposite view that if you want to be here, you have to be from the district or the county. But that's within his discretion.

MR. BALLARD: Any more questions?

MR. SHANNON: Do any of you have any questions for Flip?

MR. BALLARD: So what's wrong with choosing a venue like that? It seems to me that if I was your client I would want every advantage possible.

MR. SHANNON: Sure.

MR. BALLARD: And isn't this all about a combative experience?

MR. SHANNON: Well, you know, you talk about playing fields. For a long time, and this is my perception again. My perception is the defense part, you know, had an advantage over the plaintiff's part. Now the playing field is perceived as being tilted the other way; that the plaintiff's bar has the advantage over the defense bar. But I think all we want is a fair playing field. And that's what I'm for is a fair playing field. Whatever that is. You know, like this punitive damages. Flip and I had this case, it was a vanishing premium case. I helped him. We had a jury of six whites, six blacks. Twenty thousand in compensatory. Not a lot of compensatory. We had three plaintiffs. And the corporate conduct to me was egregious, and the jury came back with $32 million in punitive damages, but what is interesting is how they computed it. The company, 1.6 percent of their sales were in Mississippi; the jury came back with 1.6 percent of their net worth. You know, the jury system does work. I think, would you not agree, Scotty? By and large it does work.

MR. WELCH: Most of the time.

MR. SHANNON: And the jurors—you know, jury decisions are—in criminal and civil, pretty well work out. The point is I think we have a good system. It needs some modifications, some cleaning up. But I think both sides have to come in the middle and work it out. And I think it's got to be done by the judiciary and the lawyers. The legislature doesn't need to be in it. That's my opinion.

MR. WELCH: On the venue issue and I think there is something out there that may add a little twist to all of this as far as people coming in from out of state and people coming from other parts of the state to a county where they do not live, and I put that in separate categories. But we have had a very recent Mississippi Supreme Court case that talked about a lawsuit being filed in Mississippi—and it was an insurance question but it was—it was decided under the law of the state where the policy was issued. And some of these out of state folks coming in here who have taken a diet drug or whatever in Illinois or Washington or somewhere else, and somebody starts raising the issue that as to those plaintiffs venue may be right down here or may not—but as to those plaintiffs, the substantive law of some other state is going to govern the thing; one, that may stop some folks from coming down and getting the cases thrown out. It may also cause some of our circuit judges in the exercise of their discretion to decide whether they want to be Mississippi lawyers or Illinois lawyers or Washington State lawyers when they start deciding these things.

QUESTION: I have a question. I guess it goes to this. You are all seeing so many out of state cases coming in. Is that—do you find that that is having an adverse affect for Mississippians who are injured? That they are now having to wait in line to get the court behind maybe 10,000 people who may be from Illinois or California or elsewhere, and; furthermore, do you think it is right that Mississippi taxpayers have to pay the judicial resources to try the claims of people who really have no connection to this state.

MR. PHILLIPS: That's not the problem. It is a national problem. It is not a Mississippi problem. We are answering—we are asking the wrong questions. It is not what's wrong with Mississippi; it is what is wrong consumer litigation in America today? And I submit that the problem is not six counties in Mississippi. You want a chilling comment for the reform gentlemen from around the country. The rest of the nation is going to become more like Mississippi rather than vice versa,

QUESTION: I don't hear them going to other states; they're coming here. Talk about Smith County. Talk about going in there and trying a case (INAUDIBLE). That is what the case is all about. You pick the places you don't want to try the case. Why are they picking Mississippi? They are picking it because they can get a big verdict, and they know if the potential is there to get a big verdict, they can get a settlement.

MR. PHILLIPS: My co-counsel was picking it because they are defeated in class certification cases around the rest of the country. The *Jackson National* case that Jim is talking about, and I submit it doesn't—it was in a county that the previous high verdict was $500,000. And when we got through Jim said, "Well, you just beat the previous high verdict in this county by 32 million."

QUESTION: Why did Dickie Scruggs take Hattiesburg, Mississippi, to try an HMO case—

MR. PHILLIPS: Ask—

QUESTION: —instead of New York City?

MR. PHILLIPS: Probably because—all right. I will tell you what. Look at Exhibit "A" to my paper—Exhibit 1, my paper, and you will see the answer to that question. Exhibit 1 is the *Gaidon v. Guardian* case that was decided, a vanishing premium, deceptive sales practices by Guardian Life Insurance Company. It was decided by the court in New York. I was there when they decided it. Compared to *Myers v. Guardian* decided by Judge Davidson, certainly no flaming liberal, federal judge here in Oxford, Mississippi. And what was found to be absolved of fraud, the exact same deceptive sales practice scheme, I would say, under the New York law—and this isn't because of who—it is no old buddy network or anything like that. I went back and researched the law. Why is that? That it comes down different in New York from the way it comes down different in Mississippi. It is because the laws of the different states reflect the cultural values of those states. And in those two reported opinions you can see the reflection of the different cultural values of New York who said that even if it is fraud that they are absolved by fraud by the fine print in the contract.

QUESTION: I agree 100 percent with you. The laws reflect the cultural value.

MR. PHILLIPS: That is right.

QUESTION: The point is, we are trying to convince those to change the cultural values that have held Mississippi back for so long.

MR. PHILLIPS: That's right.

QUESTION: Mississippi is not—I am a Mississippian. Flip, you're a great lawyer. I've watched you—I got you to come over here to be one of my judges when I was on moot court board. So I know you're a great lawyer. All are great lawyers down here—that is the great thing bringing all these Northerners in here to show them how great lawyers are down here. The point is we do need to change the tort system in Mississippi. The plaintiffs' lawyers are going to say no—the defense lawyers, most of them, are going to say, yes. And that is the way—

MR. PHILLIPS: But I am not saying no because of the point of view of the plaintiffs' lawyers. I am saying no from the sociological point of view. I think it is wrong in the rest of the United States. I think Mississippi has been so far behind so long that it has come all the way around, and we are in front of where we all ought to be going.

QUESTION: So (INAUDIBLE) activist and recap and change the system so that Mississippi can come—

MR. PHILLIPS: We ought to change the society.

MR. BALLARD: We have got another question up here.

MR. CALDWELL: My name is Pat Caldwell, and I am practicing lawyer in Mississippi. Judge Carlson, this question is for you. (INAUDIBLE) rules like ninety days and time limits (INAUDIBLE). I don't think you folks have the resources of—like the federal system of law clerks and court administrators and things like that. (INAUDIBLE) we need to address because if we have discovery due in ninety days we are not able to get to the dispute. I would like to—obviously we can get behind you folks on resources, but also to consider something along the federal system on this category of standard complex expediting cases (INAUDIBLE) fit the cases. (Inaudible).

JUSTICE CARLSON: Very briefly on the ninety-day discovery rule. Of course, at least, my practice as a trial judge, and Pat, as you know, that especially if the request was made timely within the ninety days, then certainly as a trial judge I was very liberal in extending that discovery deadline, exercising judicial discretion, and hopefully was not abusing that discretion because unless there was an obvious abuse by the lawyers, for some reason why the—basically that they should have completed within ninety days. But for the most part certainly on any type of complex civil litigation, ninety days is not enough time to complete discovery. So, and certainly resources would help greatly if the trial judges had more resources. Thank goodness, the trial judges now have law clerks, staff attorneys, and court administrators, and perhaps may need more of that, but I agree with you.

MR. BALLARD: Specifically, what kind of procedures would you like to see and any changes to the joinder rule to make it more fair from your point of views? To make it more systematic.

MR. WELCH: Systematic and fair are not necessarily the same thing. If it's going to stay as it is, then we need in some fashion to adopt some procedures so trial judges and parties know that if a large number of people are joined you should determine one, to get away with the blanket one-year rule that has no particular exceptions in it for cases that enter a scheduling order or anything like that. There are—I think you will inevitably in a joinder situation with multiple plaintiffs in particular get to the issue of whether there is sufficient similarity and in a case like *American Bankers* to all of the claims, or is there a group over here that deserves different treatment than another. We need some way to address these things. I want—the fact of the matter is that what happens with a case like that is you get in some manner—and defense lawyers, I will say, have been a little dilatory about pushing for methods of trial selection, allowing discovery before trial plaintiffs have joined. And that's our fault, and something we need to do something about. But what happens is it goes to trial as to a small number of people; there's a big verdict, and you still got another thousand people out here you know you're going to come get clobbered by and in effect you are left with little alternative but to settle with everybody because you have a problem taking it up with a few if you can get a final judgment entered and so there—

MR. BALLARD: For something—

MR. WELCH: Procedure needs to be adopted to handle those kinds of situations.

MR. BALLARD: So something akin to a class certification type of hearing?

MR. WELCH: That's almost what you've got now. (INAUDIBLE).

MR. UNTEREINER: Could I speak to that too. One thing that has been tried in some other jurisdictions is to have Bellweather plaintiffs or to have plaintiffs that are selected equally by the defense and the plaintiffs' side, so that the first group of the plaintiffs that might go would be roughly representative of the remainder of the plaintiffs. And I think that has worked in some jurisdictions because you get a number—you get a result from the first trial that the lawyers on both sides have much greater confidence is reflective of what the other trials are going to yield. As I understand it here, what happens is the plaintiffs' side can pick the plaintiffs that you want for the first—I may be mistaken about that—and there may be some formal procedures where some of these things are done. But I think it is a good reform.

MR. WELCH: The fact—

MR. UNTEREINER: No, it is a good idea.

MR. PHILLIPS: The last case I had defendants picked five; I picked five; let's go. They picked their five best; and I picked my five best ones.

MR. BALLARD: So you wouldn't mind seeing the joinder rule change—the procedures change to have some sort of rough certification type of procedure?

MR. PHILLIPS: That's how it is working right now. It's just up to the judge.

MR. WELCH: And a question was asked about all these people coming in from other places. You know, I've just got to say from a personal point of view, part of that is—I am not nearly philosophical as Flip, but part of that has to do with the emphasis that we in America today put on the almighty dollar. A lot of those people get signed up in to be plaintiffs in cases by those lawyers out of state because the lawyers run ads and say you may be entitled to some money. And, you know, we all open the envelopes that come from Publishers Clearinghouse. And we are interested in it. And that (INAUDIBLE) we sent out. I'm a paid subscriber to the *National Law Journal*. If I had a free one, they would probably cancel it. But, you know, you read the legal media. You read your local media, and what gets reported—everything in terms of the success of the lawyer today in the media is measured in terms of dollars. And we don't write those articles, folks. That's all I got to say.

MR. BALLARD: Any more questions? All right. Any final comments? No. Okay. Thank you.

LUNCHEON FEATURING THE FORMER ATTORNEY GENERAL DICK THORNBURGH

Thank you, Krisi, very much for the generous introduction and the warm welcome that all of you have given me during my visit here. I really want to compliment the Law School and the Law Journal for bringing us all together to consider issues that are obviously of considerable concern here in Mississippi. This is my first visit to Oxford but not my first visit to Mississippi, but I must say this is a most pleasant environment in which to meet, and I am all the better for having been here.

When I was first appointed United States Attorney in my hometown of Pittsburgh in 1969, I got to know very quickly two of the veterans among the U.S. Attorneys from the great state of Mississippi. H.M. Ray and Bob Halburg, who many of you I'm sure know and remember, were always looked to as mentors by those of us who were in the rookie class that came in in 1969.

It is amazing how time flies, though, because that was a while ago, and I was reminded the other day about how quickly time goes. I was coming in from the airport in Pittsburgh to the downtown area and struck up a conversation with the cab driver as we are accustomed to doing. We were shooting the breeze back and forth, and he finally said, "What's your name?" And I said, "Dick Thornburgh." He said, "Thornburgh. Didn't your dad used to be governor of this state?" I took that as a compliment.

Well, these are difficult times, and I think it's really reassuring that we can take a break from our concentration on issues of terrorism and conflict abroad and threats to our life and well-being here at home to examine the operation of our own institutions of government, most notably in this case, our system of civil justice. And I'm pleased to participate and to learn from so many of you this morning of the aspects of the problem here in Mississippi. I don't think we can pass over the fact that we are on the eve of Veterans Day and a time of celebration of those who served our country in so many ways and in years gone by, and it's particularly fitting that we wrestle with some of today's problems in a setting like this at a time when we're engaged in defending the rule of law against the rule of violence around the world. And it's a pretty good reminder of the blessings we have in this country.

I have entitled my remarks "Civil Justice Reform: A 21st Century Priority." It was also a priority of mine in the 20th century which tells you something about our system. Somebody once said about America: "The beauty of America is that it is not always right but it's usually responsive." And I think in this case they're some things that we would like to see a little more response on. Judge Learned Hand, who is certainly one of America's most revered jurists, once observed that litigation is to be dreaded beyond almost anything short of sickness or death. Despite this very stern admonition, the United States has become the most litigious society on earth. We seem to seek a totally risk-free environment, and when something untoward occurs, the first question likely to be asked is: Whom do I sue? Our courts in many areas have become clogged; litigation has become increasingly costly, complicated and lengthy. Public dissatisfaction with lawyers and our justice system is widespread. We've not quite reached the stage where the Shakespearian call to "kill all the lawyers" is forthcoming, but signs across our society are ominous in this respect. Our tort system in particular has become something of a legal lottery propelled by visions of huge damage awards and equally outside legal fees. It imposes what amounts to a liability tax on all providers of goods and services and hampers innovation and scientific events in many key areas. Megafees are recycled back into the political process to preserve the status quo and stifle attempts at even modest reform. There's a kind of victim syndrome among our populus that eats away at the very concept of individual responsibility which has made this nation what it is. Now, I don't want to be misunderstood. With all of its faults, I still believe our civil justice system constitutes the finest vehicle for dispute resolution in the world today. I support the concept of adequate compensation for harm done.

I believe in our jury system. And I do not seek to undermine the concept of a just fee for legal services rendered. None of these basic tenets should be threatened by suggested reform. But our system is not perfect, and it deserves careful attention to its faults unless those who oppose these basic tenets be given the opportunity to carry the day.

What I will discuss with you today is the need for some common sense changes at the margins. These will not necessarily be Mississippi-specific as you will hear much discussion during these sessions by true experts in the concerns affecting this state. I offer the view of one who has been a litigator for both plaintiffs and defendants. I will revert back to some of the recommendations made by our Department of Justice Task Force which was chaired by then-Solicitor General Ken Starr while I served as Attorney General. And I will draw on experiences and insights gained over the last decade and travels to over two dozen states in the cause of civil justice reform. I hasten to add that the list that follows is my own. My own laundry list, if you will, a bill of particulars, that's not drafted by any special interest group or with any more in mind than to fine tune a system that by and large serves this nation well. Perhaps some of these suggestions will resonate with those of you who are Mississippi practitioners; some no doubt will not. But my hope is to focus your attention on five specific areas and give you my observations that have led me to conclude there are some—about an existence of real faults in our civil justice system.

Let me begin with money—big money. And in our system that means, as we heard this morning, punitive damages awards. As the name suggests, punitive damages are meant to punish. They are awarded over and above what is needed to make the plaintiffs whole.

Over the last decade, we've seen punitive damage awards skyrocket in the United States. Various remedies have been proposed, but it took a truly outlandish case from neighboring Alabama to bring things to a boil. You recall it very well, I'm sure. An Alabama doctor purchased a BMW automobile only to later discover that his new car had undergone an undisclosed touch-up paint job while it was in the dealer's hands. He sued. Eventually, he was to be awarded $4,000 to compensate him for the harm done and a whopping $4 million, later reduced to $2 million, in punitive damages. On ultimate appeal to the United States Supreme Court, the award was struck down as grossly excessive and thus unconstitutionally violative of the defendant's right to due process, and the case was sent back for reconsideration on the damage issue.

Frankly, in my own view, the Court's five to four decision in this case is somewhat shaky in its reasoning. And it does raise a specter of having every punitive damage award potentially subject to Supreme Court review, but it clearly evidenced the High Court's dismay at the loss of proportion inherent in these awards. My own reading of that case is that it was, in fact, an open invitation to the Congress and state courts to deal with the problem by establishing some limitation on punitive damage awards by legislative enactment. If so, the invitation was politely declined.

It has always seemed odd to me that in dealing with the most antisocial acts which occur in our society, that is, criminal conduct, legislatures regularly establish the outer limits of punishment. Terms in prison or monetary fines are always stated in flat terms or in maximum or minimum under sentencing guidelines. No criminal jury or judge is ever set loose in uncharted waters and told to impose whatever they wish in the way of remedies. Yet that is precisely what is done in many states with regard to punitive damages in civil cases. The sky is literally the limit, and that limit is often approached. The answer, in my view: why not limit punitive damages to a multiple? Two, three, perhaps four times, for example, the amount of the compensatory award. We know, for example, from the [*BMW v.*] *Gore* case that 500 times the compensatory award is deemed to be unconstitutional, and we learned this week in the *Exxon Valdez* case that seventeen times the compensatory award equally runs afoul of constitutional limitations. The punitive character of these damages must be maintained as a deterrent to the kinds of truly egregious conduct sought to be deterred on public policy grounds. But temptations to simply raid deep pockets would be restrained by putting this kind of limitation of multiples upon the punitive damages to be awarded. Moreover, I'd suggest that it's worth considering what some states have provided in allocating punitive damages which are after all quasi-criminal in nature: Damages go to the state rather than to individual plaintiffs as is the case with truly criminal fines.

I'm well aware, and I heard this morning that it's often argued, that many truly outrageous punitive damage awards are eventually reversed in the appellate courts or settled out of court after the verdict. The argument is, therefore, made no harm, no foul in that a just result is ultimately reached. My answer, this argument I submit begs the question: Why don't we cure the problem at the front end of the process rather than at the back end? The latter uses up valuable trial and appellate time in game playing over the size of a punitive damage award in a particular case. Statutory limits would accomplish this goal and put an end to that.

Big money also figures in the often expressed misgivings about the sizes of lawyers' fees in civil litigation. The complaint is often coupled with observations criticizing frivolous or so-called strike suits brought by contingent fee lawyers to virtually—and I'll use this word advisedly—extort a settlement from the defendant. Settlement is seen as the lesser of two evils; the alternative being expenditure of time and money in defending even a frivolous claim. The analogy in the medical world is the practice of defensive medicine: unnecessary tests or treatments to forestall a malpractice claim for failure to do so. In both cases even the average layperson can see through any attempt to justify these practices. What to do? Many suggest an application of the so-called English rule which imposes the prevailing party's legal fees in any civil suit upon the loser. This "loser pays" rule as has been pointed out by General Starr is, in fact, not an English rule at all but is, in fact, the everywhere-but-in-America rule, being the standard practice in most systems around the world. Such a rule by whatever name would surely inhibit frivolous suits. But as critics astutely observe, it might well deter impecunious plaintiffs from bringing suit at all faced with the prospect of loss of the case and a staggering legal bill for the defendant's lawyers as well.

Moreover, many countries with such a rule have more broadly available government funded legal services for low-income plaintiffs than exist in our country. So is there no room for a "loser pays" rule in our system? One answer is that—it was set forth in the Federal Product Liability Bill, vetoed by the president in 1996, a modified English rule which would use as a benchmark the final settlement offer made by defendant before trial. If refused by the plaintiff and a lesser verdict resulted, then the fees incurred by the defendant following the settlement offer would be imposed on the plaintiff. This makes pretty good sense to me because it would serve both to winnow out frivolous lawsuits and to promote the notion of advancing the time of settlement by forcing the parties to make a more realistic assessment of their cases prior to trial.

Another suggested remedy speaks to the problem of the high proportion of damage awards, often forty to fifty percent, which go to the lawyer in contingent fees rather than to the claimant. The tobacco cases, which made millionaires of many and billionaires out of some of the trial bar, brought home vividly to the average American just how well the system treats lawyers working for a contingent fee if they are successful. Suggested remedies in this score would provide for a sliding scale of contingency payments by statute or court rule, or even absolute limits on fees have been imposed in some states, capped in the same way as has been suggested for punitive damages.

A lot of the controversy, we learned this morning, surrounding civil suits these days results from the recent predominance of the class action suit. Indeed, the *Washington Post* recently editorialized and I quote, "No portion of the American civil justice system is more of a mess than the world of class actions." This mechanism was originally conceived as a vehicle for resolving large numbers of similar claims in a single forum in order to reduce costs and relieve the courts of the burden of trying these claims separately. Today, they have matured into often contrived megaactions which are routinely forum shopped into friendly jurisdictions to provide a potentially big payoff for voracious plaintiffs' lawyers. While I understand that Mississippi does not provide for class action suits as such, much of the same criticism is attached to the multiplaintiff joinder suits or quasi-class actions allowed under your state's unique "one and all" rule. And there is no counterpart in this state to Federal Rule of [Civil] Procedure 23 to regulate such suits here.

It is a class action suit where the fee system truly goes haywire. Lawyers' compensation is often totally unrelated to the awards to individual plaintiffs, many of whom are actually unaware of the action being brought in the first place in their name as a class member. Frequently, multimillion dollar legal fees are awarded to litigators coupled with the award of a coupon to each of their clients entitling them to a small discount on some future purchase of the product or service sold by the offending defendant. No justice there. Even when a cash award is forthcoming, the result can be outrageous. My favorite example, again taken from Alabama, was in a federal antitrust class action suit where the jury found for the plaintiffs but awarded only a token one dollar in damages. The attorneys' fees allowed by the court: $2 million dollars. These actions have an even more sinister characteristic in their capacity to seek to influence public policy, an entire industry, before the nation as a whole.

Recent lawsuits involving lawful products such as tobacco, firearms, lead-based paint, pharmaceutical products and health maintenance services promote a kind of regulation by litigation where trial lawyers take the place of legislators. A development described by economist Robert Samuelson as not healthy. He noted government by litigation subverts democracy. Litigation as politics subverts the law. There have been various forthcoming proposals to deal with class action abuse. Federal legislation awaits action in the Congress which would facilitate removal of such suits to federal courts vastly reducing state court jurisdiction and the frequent forum shopping that accompanies interstate action. Cost benefit tests for class certification—a requirement that plaintiffs opt in rather than being forced to opt out of the class and a prohibition on settlement classes. These are other suggested remedies. But in the final analysis, I think the best cure of all would be for judges to give more careful scrutiny to settlement terms, to reward attorneys only on the basis of actual accomplishments and to make more frequent use of neutral experts.

This latter leads to the final substantive area of my concern, and here I speak of the so-called junk science, the use of self-identified experts to establish somewhat bizarre connections between various products or practices and an equally dubious myriad of bodily injuries. If a so-called expert's curriculum vitae demonstrates general expertise in a particular field, then almost anything that person offers an opinion on, whether based on science or pure speculation, often constitutes legitimate testimony. Junk science all too often provides a basis for enormous damage awards or settlements only to be proved utterly groundless when the dust has settled. Let me give you an example. We're all familiar with the breast implant litigation. In 1982, a single plaintiff sued Dow Corning claiming without any clear medical proof that breast implants had caused a wide array of ailments. Thereafter, a noted television journalist aired a story on breast implants which included inflammatory statements based on the opinions of two doctors with no medical research experience in the area of breast implantation.

Members of Congress and later the Food and Drug Administration picked up the issue and a series of public hearings roused public concern to a fevered pitch. Years of litigation followed. Millions of dollars were paid out in settlements, and the product's principal manufacturer went bankrupt. By now, however, the evidence seems overwhelming that there is, in fact, no causal connection between implants and the injuries and ailments alleged by the claimants. Most recently the basis for these claims was soundly rejected by the prestigious National Academy of Sciences. Yet throughout this litigation, junk science experts were ready to stake their reputations, such as they were, at a price on bogus theories linking breast implants to a host of bodily injuries. And the beat goes on. We read today claims that power transmission lines cause cancer. Experts concocted the famed Audi 5000 phantom acceleration threat. And a Baltimore-based lawyer now is suing cell phone manufacturers not because his clients have been injured but because they may some day fall victim to it as yet undesignated nature.

Here, again, the problem reached such proportions that the United States Supreme Court had to step in. The *Daubert* and *Joyner* cases reemphasize the importance of the trial judge acting as a gatekeeper with respect to expert testimony. Under these holdings, it is the trial judge who must ensure that juries receive only relevant and reliable evidence of causation in federal cases, evidence that passes minimal standards of scientific credibility and acceptability. Only an abuse of discretion would warrant an appellate court to second-guess a trial judge's ruling. Justice Breyer, concurring in the *Joyner* case, referred to a further possible safeguard as well. Reviving a proposal first made by Judge Learned Hand nearly a century ago, he suggested the use of court-appointed neutral experts in lieu of the parties own kept experts whose conflicting testimony often completely confuses a lay jury. These neutral experts have been available under federal rule since 1975 and a use that seems would go a long way toward unraveling complex scientific claims in the courtroom. In 1999, the American Association for the Advancement of Science launched a program to make independent experts available to federal judges concerned about admitting unreliable evidence in their courtroom. And this movement appears to be gathering a full head of steam.

My final recommendation would be to revisit the effort to enact a federal product liability law in recognition that our economy has become truly national and indeed international in its character. Most American manufacturers produce their products in one or more states. They make distribution centers in a variety of others and sell their products in nearly every state of the Union, but they must still put up with a crazy quilt collection of fifty different state laws which leave them often baffled as to what liability risks they must face. And the costs keep going up—for all of us. Litigation not only increases the cost to American businesses and ultimately the

American consumer, but it impedes our international competitiveness as well.

Former Commerce Secretary, Peter Peterson, notes that product liability is the area of law that poses the greatest threat to American competitiveness and overall economic prosperity. Liability risks also have a negative impact on the innovative process which has always been the distinguishing attribute of American research and development efforts. The drug Bendectin, a morning sickness remedy, for example, was actually pulled from the market because annual sales could not support annual expenditures for litigation and insurance despite the fact that no claimant had ever prevailed in any lawsuit against the manufacturer. Who knows what other promising medical research leads may well have been foregone for similar reasons?

A national products liability law incorporating the features I've discussed here today would go a long way to dealing with this problem. The bill passed in 1996 with strong bipartisan support would have accomplished this, but it was vetoed by President Clinton, an action largely conceded to have been bought and paid for by the plaintiffs' bar. As noted at the time, not by me, but by a fellow Democrat, West Virginia Senator Jay Rockefeller, and I quote, "Special interests and raw political considerations in the White House have overridden sound policy judgment. The President needs these lawyers and their money more than he needs good public policy." A renewed and measured bill will surely find its way onto the congressional agenda when normal times return, and it will likely get a more favorable treatment this time from a President who has already proved his mettle as a supporter of civil justice reform as governor of Texas.

As I have stated, I am no expert in Mississippi law or in the kinds of specific problems which you face in your own civil justice system although I had a good introduction this morning. But I've read enough to know that you have earned a reputation as a mecca for litigators. It does not reflect well on your state or your civil justice system when small business owners can't afford liability insurance because rates have become so expensive, when doctors stop performing high-risk procedures because of enormous concerns about medical malpractice liability and when physicians and pharmacists hesitate to prescribe and dispense FDA-approved drugs for fear of product liability suits. These are warning signs in response to which you must begin to fashion a response. I'm sure that you'll get much specific guidance from the experts gathered for this symposium. I hope my observations today have offered some general guidance to those of you interested in building a sounder, fairer system for the resolution of civil disputes in your state. It is a worthy cause.

One final observation. Many Americans appear to think that issues of civil justice reform are of concern only to lawyers, judges and academics. Ordinary citizens find it hard to relate controversy over legal principles to their everyday lives. I would suggest, however, that in at least three areas all Americans have a real stake in reform: Enhancing our economic competitiveness and ensuring job security, preserving our health care system and the viability of medical research, and guaranteeing to all citizens a timely day in court. All of these interests are adversely affected by present shortcomings in our civil justice system. In the final analysis, perhaps the best piece of advice in this area came from a seasoned litigator over a century and a half ago. Listen to what Abraham Lincoln observed: "Discourage litigation," he said. "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time." Things don't change much, do they?

In truth the real losers today from a failure to reform our costly tort system may well be American working men and women. Our lessened ability to compete in world markets and slower economic growth at home may well generate fewer high quality jobs and result in a lesser quality of life. Defending a system that promotes such a result does no favor to this country or to its citizenry.

I thank you for the opportunity to be here today to speak to you today, and I wish you well for the remainder of this symposium and thereafter in your examination of Mississippi's civil justice system. Thank you very much.

ASBESTOS ISSUES

PANELISTS:

Jeff Andrus, Moderator
Victor E. Schwartz
Francis McGovern
Thomas W. Tardy, III
David O. McCormick

CHARLES HEWINS: I guess we'll go ahead and get started again with the next panel, the asbestos panel. Jeff Andrus is the moderator. He is the editorial director and cofounder of Harris Martin Publishing in West Chester, Pennsylvania. He has covered mass tort litigation throughout his career, and he has published a number of national litigation magazines, including Columns Asbestos, so Jeff Andrus.

MR. ANDRUS: Thank you, Charles. And I just want to thank everybody at the University of Mississippi School of Law for having me here today to introduce what is an extremely distinguished panel in the area of asbestos, which this year has probably been one of the most active in the thirty-year history of the asbestos litigation both here and elsewhere throughout the country. Litigation has certainly started changing course, as a lot of you probably know, with a vast number of Chapter 11 filings by some big name defendants in the litigation. Arriving with these changes is a renewed focus on so-called new or nontraditional lesser known defendants which I'm sure we're going to hear a little bit about today from our panel, as well as a number of new theories on liability and along with it, too, an unprecedented uncertainty regarding the future of asbestos-related claims. In a time when logic tells us that a number of asbestos claims should probably be decreasing, they are in fact increasing.

So with that being said, I'd like to introduce our panel. The first two speakers are actually University of Mississippi School of Law alumni Tom Tardy and David McCormick. Mr. McCormick is currently an active member of the Board of

Alumni. He has extensive experience in the area of asbestos litigation having represented plaintiffs in the litigation for more than a decade. He has secured multimillion dollar verdicts and settlements for thousands of people afflicted with asbestos-related diseases, and currently he serves on the official committee of asbestos claimants for both the Owens Corning GI holdings bankruptcies. He is a partner of Cumbest, Cumbest, Hunter, and McCormick in Pascagoula, and he is currently working with the office of Mississippi Attorney General in its bit to recoup from the tobacco industry more than $4 million in health care costs paid to treat smoking-related ailments.

Mr. Tardy is a very well-known attorney, a very well-known asbestos attorney at probably one of the most recognized asbestos law firms in the country—Forman, Perry, Watkins, Krutz and Tardy in Jackson. The firm serves as national counsel for seven asbestos companies and is regional counsel for several more. Active in the litigation since 1978, he has represented more than 100 defendants sued in Mississippi, Texas, Alabama and Florida. His clients range from more traditional defendants to the so-called new wave defendant fast becoming the focus of this litigation. He is a member of the Defense Research Institute as well as the International Association of Defense Counsel. So welcome Tom Tardy.

Our next two speakers, Victor Schwartz, who is a partner and chair of the public policy group in the Washington, D.C., office of Shook, Hardy, and Bacon. In addition to advising product manufacturers on several areas of liability, he also quite literally wrote the book on tort law. He is the coauthor of the most widely used torts case book in the United States, *Prosser, Wade, and Schwartz Torts*. He has served as Chairman of the Federal Interagency Task Force on Product Liability and has twice been recognized by the *National Law Journal* and the *Washingtonian* as one of the country's most influential attorneys. In addition to these accomplishments and many more, our first speaker also serves as general counsel to the American Tort Reform Association and has filed briefs and written extensively on behalf of the Coalition for

Asbestos Justice.

Our final speaker, Professor Francis McGovern is professor of law at Duke University, and as I found out last night also teaches at Stanford. His name has become synonymous with mass claim litigation. He spent his career developing sophisticated models for claims valuation and settlement structure in litigation involving toxic exposure and medical devices such as the Dalkon Shield and silicone breast implants. A prolific author who has published such books as *Successful Litigation Techniques: in the Preparation of a Product Liability Case*, he was among the first in the nation to write about and use alternative dispute resolution as a means of avoiding and improving the litigation process. His insight into the practical and conceptual application of dispute resolution is widely sought by the federal judiciary, various state court systems and institutions around the globe. Please welcome Professor Francis McGovern. I guess we'll follow the same format as we did earlier, about twelve minutes per person, and then we'll start with the questions. David, if you want to take it away.

MR. MCCORMICK: Tom said that's what usually happens to me when I argue in a courtroom is the lights go out and everybody goes to sleep, so hopefully that won't happen here today, but it is a pleasure to be here with you today and with the distinguished colleagues to my right. First of all, I would like to say that I listened with interest earlier this morning with some of the arguments back and forth, and I have a little different perspective when it comes to asbestos litigation than maybe some others because my wife's family worked in the shipyard in Pascagoula where we're from, and a number of them contracted either asbestosis, and, unfortunately, a couple of them contracted mesothelioma which I will talk to you about in just a little while. So it is not just an attorney/client issue with me; it's also an issue that revolves around a personal situation that I have witnessed and viewed, and so I have a little different perspective than some others. Having said that, I understand my topic today is to give you somewhat of a history of asbestos and somewhat of the medicine. I'm not sure that's possible in twelve minutes, now ten minutes, and I'll do my best.

Asbestos is a stone, a raw material that's found in the ground mined to be utilized in heat insulating products. Henry Ward Johns and Mr. Manville formed the Johns-Manville Company in the 1800s, and it later became the largest single asbestos manufacturing company in the world. In 1982 that company filed for bankruptcy as a result of the litigation that was upon them. And there is a reason for that, and we'll go into that in a few moments. But what is asbestos? A naturally occurring fibrous stone or a mineral, a wooly fuzzy rock that is found and utilized. There are basically two types: chrysotile and an amphibole. The amphiboles are usually considered to be a more harmful or dangerous type of product because it has a different characteristic. If you look on the screen behind me, you'll notice that the amphibole asbestos fibers are completely different from chrysotile, and what that does is when ingested into the lungs makes it extremely difficult for the immune system to eradicate them. And what that causes is scarring in the lungs, and we'll talk about the medicine here in just a little bit.

The two types of amphiboles are amosite and crocidolite. Amosite was used in a lot of products that were applied for pipe insulation aboard many of the navy vessels used in World War II and thereafter. Crocidolite was mined and sent here from Australia and South Africa and is probably—well, it is considered to be one of the most dangerous forms of an asbestos fiber. It's blue in character; they call it blue asbestos. Johns-Manville had products called Blue Mud, and it had a characteristic that you would unmistakably see. What are some of the historic uses of asbestos? You had insulation products from all different types from pipe insulation to asbestos cloth, and they were utilized in cement and they were utilized mainly aboard ships and other paper processing plants so that the heat processes would not affect the operation of the ship or the plant. These were the traditional defendants in the asbestos litigation: Pipe insulation, block insulation, and the people who installed that. And the early round of your cases that you saw in asbestos started with insulators who were applying these materials and were in close proximity to them and worked with them day in and day out.

As time went on you saw that gravitate towards less and less exposed people receiving various forms of the disease including mesothelioma. But the use of asbestos wasn't just aboard ships; it was used as you can see by everything you can think of from paper, ropes, stoves, your hair dryers back in the '60s and '70s. They all had asbestos in it. The siding on a lot of houses had asbestos in it, roofing shingles, fireproof clothing for firefighters. It was universally used. Now asbestos in its static state is not something that is per se dangerous. It's only when the fibers are released into the air that there becomes a problem that can become a health hazard, and these companies basically knew that as far back as the '30s.

In 1972 OSHA came out with some regulations that gave us what's called the TLV or the threshold limit value which, if you exceeded, you were in a situation where you would have a harmful effect or cancer-causing effect to individuals who were exposed over prolonged periods of time. Now, what is it that these fibers cause medically? There are essentially four or five types of disease processes. First of all, a condition called pleural thickening. Now pleural thickening and pleural plaques are generally not considered to be a disease that has any debilitating effect. By that I mean it is a precursor to what may happen down the road. You generally do not have a breathing problem per se. There is no doubt, though, that if you have pleural plaques, you have then been placed at an increased risk to potentially contract cancer.

The next medical condition that is generally accepted as a condition from the exposure to asbestos is a condition called asbestosis. Now the American Thoracic Society has given some parameters for which they say you can diagnose asbestosis and one of those characteristics is shortness of breath, dry cough and rales. Obviously, you know what a cough is, but when you are looking for rales that's when the physician is actually listening to the breathing sounds so that he or she knows what is going on physically within somebody's body. I'm sure there will be some discussion at some point in time during the day that a lot of cases that are now in the courts maybe don't have that full and complete examination, and they have an x-ray finding, but we don't have all the other ingredients. As we presently sit in Mississippi, though, if somebody is diagnosed with something that is a disease process, their statute of limitations begins to run. It creates an influx of cases that have to go to the courts, or they will be barred by the statute of limitations.

Now, the next form that asbestos exposure takes is to lung cancer. Asbestos is clearly a carcinogen. I don't think anybody would disagree with that. Lung cancer cases for the most part, I would say 99 percent of them, also have somebody who has had a smoking component in their life. What smoking does, not only does it cause cancer as everybody knows, but it also allows the fibers that would otherwise be inhaled more easily go down the esophageal tract because the natural immune system is not allowed to keep the fibers out because they make the cilia lay down and, therefore, it's easier for those fibers to go in. Well, most of the people that worked in the shipyards in the World War II era—the '50s and '60s—were smokers, and, therefore, they were more apt to get asbestosis and lung cancer.

There are several other forms of cancers that are associated with asbestos, more difficult to prove but nonetheless related and generally accepted as related to asbestos exposure, and those are laryngeal or esophageal cancers, rectal, renal and colon cancers. Most plaintiff or defense lawyers would accept those as a cancer that is being caused by asbestos exposure. And in discussions for settlement or otherwise that is something both sides would recognize. But the most debilitating form of cancer that is found as a result of asbestos exposure is mesothelioma. Mesothelioma is always fatal and virtually tied to asbestos as the only cause for which the medical profession has been able to provide us. It is a reaction to the lining of the lung, and it is—like I say, it's always fatal, and it is a horrible, horrible way for a person to die. I have represented well over 100 people who have died of mesothelioma. And it will be one of the most gut-wrenching things you could ever witness somebody to basically be choked to death like a snake taking the breath away from you inch by inch.

Now, why is it that companies are sued for this? Well, you have the—who are the defendants? Who are the target defendants? Well, they used to be pipe and block insulation people that we spoke of. They were traditionally very dusty products. Now we've moved to another realm. The equipment manufacturers have specified that these products go on their vessels such as boilers and whatnot. And now even past that we have found that some of the insurance companies may have been involved in a conspiracy in trying to keep certain bits of information from the public.

The Sumner Simpson Papers—they're referred to that because they were writing back and forth between the asbestos industry and the attorneys and representatives of Ray Mark and Johns-Manville. Basically, they wrote and said we found some interesting problems here: this is going to cause cancer and other lung problems. And we want to publish about it. The asbestos industry suppressed this through their attorneys, through their representatives, and that is why you see so much litigation about the hiding of documents and the hiding of the materials that otherwise the workers in the public place should have been warned of. And that is why you generally find that there are punitive damages.

There are a number of people in this audience that have had large verdicts awarded for their clients, and the reason is the egregious conduct, and that's what the jurors are seeing when they come into the courtroom. A failure of these companies to warn anybody of anything and then debilitating diseases such as mesothelioma occurring, robbing families of their breadwinner and of the love, society and companionship that they enjoyed for fifty-something years. It's really difficult to sit in front of a fifty-five-year-old man who is raising children and watch him die because he wasn't warned of the danger. Thank you.

MR. TARDY: Good afternoon. I'm Tom Tardy, and as Jeff mentioned, I'm with the Forman, Perry [Watkins, Krutz and Tardy] law firm, and we have been active in asbestos litigation—I hate to say this, but Rick Forman and I attended our first asbestos deposition in 1978. We've done since then asbestos on a nationwide basis and literally we have over the course of that more than two decades represented over 100 asbestos defendants and represent about that many today, not the same by any means. And so constantly we are talking to asbestos companies, large and small. I talk to these companies every day so, as I sit here today, I can tell you exactly what asbestos defense companies are saying and thinking about asbestos litigation today. I can even give you a picture; it's this: There are two questions. The first question is: Who is going to be next? So far, forty-one defendants in asbestos litigation, and many of these have been our clients, have gone bankrupt. That's forty-one in a twenty-year period. And the second question is: What can I do to keep our company from being the next defendant who is going bankrupt?

As I looked around the room this morning, I noticed that there are not a whole lot of lawyers here who do asbestos litigation on a frequent basis and exempting Rick and me there aren't any old asbestos lawyers here, so there is nobody that really lived this asbestos situation. And David and I thought in order to really posture this problem for discussion, all of you really needed to know about the history of asbestos litigation and how it got started and how we began with serious cases and the small number and how we have ended with the massive problem that we really have today. But to get you there I need to start with where we are today. This is all published results.

The Rand Group came out with a study published in August of this year that analyzes asbestos litigation retrospectively and made some rather profound predictions of what's going to be happening in the future. You see 500,000 claims have been filed since 1968 or so. Interestingly, 2,500,000 claims are projected in the future. There are over 1000 defendants that today are sued, and we are going to get into a discussion later this afternoon I hope as to who those defendants now are.

As I mentioned, forty-one companies are now bankrupt, and I think the most profound prediction of all is the Rand Group expects all of the traditional asbestos defendants to be bankrupt within the next two years. Mississippi has likewise had its share of misery, and I counted these cases a little bit different than Shane did this morning. According to our files since we've been handling asbestos litigation in our state, and I think we've been in every case, there have been 82,537 plaintiffs who have filed claims within this state. Almost all of those cases are pending in one form or another. Though some are dormant we still have well over 50,000 active cases this month. We have them in twenty-seven counties and I say at least 23,000 plus are out-of-state residents. The reason I can't predict with more certainty is there are 40,000 plaintiffs in Mississippi today who have filed cases in a mass complaint listed only on Exhibit A, and all we have an is a name. We don't have a social security number, we don't know where they worked and we don't know where they live. So it's quite likely that there is a reason why they didn't list where they lived, etc. We're more likely to have 60,000 of these folks from out of state than we are in state.

So that is where we are today, and I'm going to tell you now about how we got there, and we can all blame it on Texas. The first cases came from Texas. Actually, the first case was the *Claude Tomplait* case, and the defendants tried that case to a defense verdict. And we lose sight of this. These cases are defensible. Every month somewhere in the United States cases are tried and won by the defense. We can't lose sight of that simply because of the horrendous verdicts that we are seeing in Mississippi on a frequent basis now.

Borel was a typical prototype plaintiff that we saw in the '70s and '80s. He was an insulator which is a person that worked eight hours a day, five days a week with a product that was very dusty and contained a tremendous amount of asbestos. He breath,ed it; he got—not only did he have the worst condition, the worst cancer I think you can have, mesothelioma, he also had asbestosis which is a dose-related disease process. The more you breath, the worse it gets. For that disease in 1968 dollars, he got the grand sum of $79,000 and some change from six companies, all of whom are now bankrupt.

Mississippi, we're not quite as early, but in 1978 when we had our first filing, there were only two handfuls of asbestos cases pending throughout the nation. They, like Mr. Borel, were all serious cases. They were filed individually. They were filed in the United States District Court because that was the forum of the plaintiff's preference at the time. They involved either insulators or a great number of shipyard workers who actually either worked with or around asbestos. The shipyard was one of the most prolific users of asbestos insulation in the history of mankind. For the most part, they were all injured. When we saw cases back in those days, we did not really have an opportunity to contest the disease because our doctors and their doctors said these folks were sick.

Our first case tried was the James L. Jackson case in 1982 for compensatory damages of almost $400,000 and the punitive damages assessment was really one of the first, not *the* first, but one of the first assessments of punitive damages. Perhaps the first against Raybestos-Manhattan, Inc. Ironically, one defendant walked even in that case, H.K. Porter. It didn't do them any good. They went bankrupt before the end of 1982 as did Johns-Manville.

Quite remarkably we went almost a decade in Mississippi without having another asbestos trial. And there are several reasons for that; one, the federal courts got smart. They referred every case then pending to the multidistrict litigation panel who sent them all to Judge Weiner in Philadelphia, Pennsylvania, where they remain today. The other reason is we formed a very effective defense coalition. I think it was called the asbestos claims facility. Dean Wellington up at Yale was the person that really was instrumental in putting all this together. And we looked at and treated each asbestos case individually to determine what it was worth and that was done throughout the nation, and these cases were litigated during 1985 to 1993 just like a regular lawsuit.

Then everything changed. The plaintiff's forum changed from federal court to state court. We then began to get a tremendous proliferation of filings, and this started back in 1988 and 1989, primarily in Pascagoula, Jackson County, Mississippi because that's where the shipyard was. It was the largest nongovernmental employer in the state of Mississippi.

It had 30,000 folks at one time, and so there were a lot of people exposed. So we got a lot of cases, and frankly, 9500 cases today doesn't sound like very much in asbestos volume, but back then that was huge, and nobody knew how to handle that situation.

Obviously, with three judges in Pascagoula you couldn't try those cases individually. So at the plaintiffs' suggestion, and I think with Francis's help—and he's still my friend—they came up with something called a common issue trial. When prototype plaintiffs were selected, and you'd have the most serious diseases all the way down through the plaque, the least serious disease, we'd try those cases, and then we'd have many trials. If there was an assessment of liability against the defendant, that liability assessment would apply in all of the thousands of cases then pending. We try each remaining case on merely exposure, causation and damages. And then for punitives there would be what's called a multiplier and that multiplier would be for every dollar of actuals a certain sum of the money would be given in punitives.

The first case we tried was *Scordino* resulting in a massive verdict and then a three times three X multiplier. That case was the first time we ever tried. It was confusing; the judge threw out the verdict, and I think that's all we need to say about it today. Then we had the *Abrahms* case which we thought then was the mother of all asbestos cases. It was tried before Judge Jackson for four and a half months. The *Scordino* case is still around today. The *Abrahms* case, even after we tried it, finally settled with the last defendant I think in 2000; perhaps in 2000 Westinghouse finally settled the last of that case.

What it really did for us is it forced us to settle. With these types of numbers and this type of leverage, there was no other alternative, or so we thought at the time, so we developed a very efficient settlement mechanism. All you had to do was give us an affidavit of exposure and a medical certificate, and we would give you money. And what happened with that is that set up a very streamlined procedure for getting some money. And as a result of that, we got a lot of additional cases; the plaintiffs change; we got out of the shipyards; we got into first, paper mills and then factories, and then I don't know what you would consider the people that recently have tried their case in Holmes County. We then saw filings in very rural counties that were known for plaintiffs' verdicts, and we saw extensions of the joinder rules to allow a case to be filed by not only a thousand different plaintiffs but a thousand different plaintiffs who lived in different areas including different states and who lived and worked in hundreds, if not thousands, of different exposure sites. So there's absolutely little, and I contend, no commonality among the plaintiffs that then were filing suits.

We didn't understand the significance of the location until we tried the *Cozy* case back in 1998. The *Cozy* case was a monstrous verdict in a county that Jim has spent quite some time on this morning. Rather than take a risk to see just how great a verdict for punitives this jury would assess, we settled that case. Basically, what *Cozy* did to the filings was, we were actually going down in 1997. We had fewer filings. This case was tried in 1998, and we went all of a sudden to about 3000 plaintiffs filed in a year to 17,000 in 2000 and 19,000 so far in 2001. I'm not so sure that counts the latest couple of cases; we're probably over 20,000 easily now. Obviously have to say something about this case.

If you allow the defendants to select the plaintiffs in a case, we would select people who were minimally sick, minimally exposed, and everyone who knows anything about this case knows that there was very little exposure to the products of the two defendants who make products and very little injury. There is not a single penny of out-of-pocket expenses. There is not anyone who ever went to a doctor for an asbestos disease except for the screening physician who happened to say that they were sick, and they didn't know it until they went to a screener. And, of course, nobody ever missed a single day of work. This would have been the case that we would have tried. We'll have time to discuss in more detail later.

I will show you in conclusion this is who has been paying, and, Jim, I'd be concerned about this if I were you. This is the top twelve payers in the year 2000. Of the top six payers, all six are bankrupt since 2000. Every one has gone bankrupt, and seven out of the top twelve are now bankrupt. So I think that adequately identifies the problem, and I'll let Victor and Francis tell us how we are going to be solving it.

MR. SCHWARTZ: First, I want to thank the *Mississippi Law Journal* for putting all of this together. I have many friends out in the audience, but I certainly want to acknowledge Bob Montgomery who I work with in Mississippi issues and Senator [Steve] Seale who I got to know in the late '80s and early '90s in my first voyages out here. And I hope this won't count against my time, but I came out here quite a bit then and my first trip was—a cab driver picked me up in Jackson, and he had a bag of Chee-tos that was the largest I've ever seen in my life. It was higher than me, and he said to me—I said, "I'm Victor Schwartz," and he said, "Mr. Schwartz, do you mind if I eat these Chee-tos?" I said, "Well not at all, sir, and he ate some, and the next three or four times he'd ask permission; finally he didn't. About five years later he said to me, "Mr. Schwartz, would you like some Chee-tos?" Well, I felt good, and a bill I was working on passed that day; I call it the Chee-to bill. And it also made me an honorary state member, and I take that honor with a great deal of thanks. I also want to mention my colleague Mark Behrens who has been very modest by not putting himself on this program. But this program would not have happened if it were not for Mark. It was a conception, an idea he had working with the *Journal*, and he worked tirelessly to have balanced panels here. Every panel you have seen has not had one point of view but a balanced point of view, and I'm grateful for his friendship and that he is my partner. I had been involved in asbestos litigation in the '80s. Our firm at the time represented a company called Eagle Pitcher. We won every case. These were property damage cases, but it's the old story: Won every case, but the client went broke, and I had kind of left it for a long time—it was kind of a Rip Van Winkle thing—and then came back to it a year or so ago. Attorney McCormick presented an excellent picture of what things were like the way I saw them in the mid '80s, but that's not how I really see it now. Now things are different.

Punitive damages as everyone knows are meant to deter. Well, if there hasn't been deterrence in asbestos with all the punitive damage awards, I don't know if there ever can be.

THE LAW OF UNINTENDED CONSEQUENCES IN ASBESTOS LITIGATION: HOW EFFORTS TO STREAMLINE THE LITIGATION HAVE FUELED MORE CLAIMS

Victor E. Schwartz[*]
Rochelle M. Tedesco[**]

Asbestos litigation has become an unwieldy permanent fixture in the American civil justice system. Courts and commentators have described asbestos litigation as "an elephantine mass,"[1] a "multi-billion-dollar crisis,"[2] a "job-eating blob"[3] and a "court perennial."[4] Although thirty years ago, many in the legal community knew that asbestos litigation was going to be big, few would have guessed that courts today would still be grappling with ways in which to deal with an exploding number of filings. In fact, many people do not even realize that asbestos litigation is still an issue. They think that it is a relic of the past. They are wrong. As we will show, the current situation is a litigation nightmare, and, unless steps are taken now to address the crisis, it will continue to be a problem in the future.

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[1] Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

[2] Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 383 (1993).

[3] Editorial, *The Job-Eating Asbestos Blob*, WALL ST. J., Jan. 23, 2002, at A22, [hereinafter *Asbestos Blob*], *available at* 2002 WL-WSJ 3383766.

[4] Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, *available at* 2001 WL-WSJ 2856111.

While one might think that because "use of new asbestos essentially ceased in the United States in the early 1970's,"[5] asbestos cases would be decreasing; in fact, the opposite is true. The number of new asbestos filings is increasing, and according to most estimates, will continue to be a major legal and policy problem for many years (if not decades) to come.[6] For example, from 1993 to 1999, the number of pending cases doubled—from 100,000 cases to more than 200,000 cases throughout the country.[7] From 1997 to 1999, new filings against individual defendants ranged from 20,000 to over 60,000 for individual defendants each year.[8] Armstrong World Industries reported receiving 40,200 new claims for the first three-quarters of 1999 and 71,000 claims for all of 1998.[9] Kaiser Aluminum reported 29,700 new claims for the first three-quarters of 1999 and 22,900 claims for 1998.[10] GAF Corporation reported 42,200 new claims during the first three quarters of 1999.[11] W.R. Grace & Co. reported 20,629 new claims during that same period.[12] All of these companies are now in bankruptcy.

Like the number of asbestos cases being filed, the size of jury awards in asbestos cases is also on the rise. For example, in March of 2001, a Texas jury awarded twenty-two plaintiffs a total of $35 million for damages including "future physical impairment" and "future medical costs" despite the fact that these claimants were awarded no damages for a present physical injury and may never become seriously ill.[13] In October of 2001, a Mississippi jury awarded $150 million to six plaintiffs "who are not sick from asbestos and may never become so."[14] The plaintiffs were awarded $25 million apiece because their exposure to asbestos-containing products in the workplace, often decades ago, allegedly places them "at risk" for developing an illness at some point in the future.[15] In November of 2001, another Texas jury awarded $3 million to three plaintiffs who were exposed to asbestos at an aluminum plant.[16] "Their attorney said the verdict was reached even though two plaintiffs who do not have cancer were forbidden from testifying on their fear of developing the disease from past asbestos exposure."[17]

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[5] *See In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 737 (E. & S.D.N.Y. 1991), *vacated* 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

[6] *See, e.g.*, Michael E. Angelina & Jennifer L. Biggs, *Sizing Up Asbestos Exposure*, *available at* http://www.tillinghast.com/tillinghast/publications/periodicals/emphasis/Emphasis_2001_3/2002041814.pdf (visited Sept. 18, 2002).

[7] *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 27 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Edley Statement].

[8] *See* H.R. REP. NO. 106-782, at 18 (2000).

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

The increase in asbestos claims and rise in verdicts are acutely affecting the parties involved in asbestos litigation. An example is the Manville Personal Injury Settlement Trust. The Manville Trust was established to deal with asbestos compensation claims against Johns-Manville Corp., which in 1982 was the first major asbestos defendant to file for bankruptcy. In 2000, the Manville Trust received over 58,000 claims, which is nearly twice as many claims as the Trust received in 1999.[18] In 2001, over 69,000 claims were filed against the Manville Trust, prompting the Trust to announce that it would have to lower payments to claimants due to the increase in claims.[19] Truly injured individuals have become victims of this avalanche of new claims.

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[13] *Two Asbestos Defendants Hit with $35 Million Verdict*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

[14] Patti Waldmeir, *The Need for Damage Limitation*, FIN. TIMES (FT.COM), Nov. 15, 2001, *available at* 2001 WL 28473877.

[15] Margaret Cronin Fisk, *Jury Awards Six Asbestos Plaintiffs $25 Million Each*, NAT'L L.J., Nov. 12, 2001, at B1.

[16] *See Texas Jury Awards $3 Million in Asbestos Exposure Cases*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001).

[17] *Id.*

[18] Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, *available at* 2001 WL-WSJ 29680683.

Other companies are being forced into bankruptcy as a result of the avalanche of new asbestos claims pouring into the tort system. In fact, "the process is accelerating."[20] In 2000, Babcock & Wilcox Co., Pittsburg Corning Corp., Owens Corning and Armstrong World Industries, Inc. declared bankruptcy. In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-I Holdings, Inc. (formerly known as GAF Corp.) sought Chapter 11 protection. Early in 2002, RHI Refractories Holding Co., the world's leading producer of refractory materials for the steel industry, was forced to seek bankruptcy protection for two of its United States subsidiaries (Harbison-Walker Refractories Co. and North American Refractories Co.) as a result of asbestos liability claims.[21] Porter-Hayden Co. and Kaiser Aluminum Corp. also were forced to file for Chapter 11 reorganization in early 2002.[22] To date, approximately sixty companies have been driven into bankruptcy.[23]

As more and more "traditional" asbestos defendants enter bankruptcy, the list of companies affected by asbestos litigation has grown and is no longer limited to "traditional defendants" that manufactured or sold asbestos. Recently, 3M Co. and Halliburton Co. watched, along with retired persons and others who invested in these trusted companies, as their stocks plummeted after juries imposed sizable verdicts on each for asbestos claims.[24]

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[19] *Id.*

[20] *In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom.* Collins v. MacMillan Bloedel, Inc., 532 U.S. 1066 (2001).

[21] *See* William Hall, *Asbestos Claims Force RHI to Seek Protection for U.S. Arm*, FIN. TIMES (FT.COM), Jan. 8, 2002, *available at* 2002 WL 3302344; William Hall, *RHI Forced to Seek Protection for U.S. Business*, FIN. TIMES (FT.COM), Jan. 7, 2002; Alexei Barrionuevo, *Halliburton's Asbestos Liability May Gain Clarity As Harbison Files for Chapter 11*, WALL ST. J., Feb. 15, 2002, at A2, *available at* 2002 WL-WSJ 3386190.

[22] *See* Robert Guy Matthews, *Kaiser Aluminum Files for Bankruptcy Under Chapter 11*, WALL ST. J., Feb. 13, 2002, at A4, *available at* 2002 WL-WSJ 3385837; Peter Geier, *Porter-Hayden Bankrupt*, THE DAILY REC. (Baltimore, Md.), Mar. 19, 2002, *available at*, http://www.mddailyrecord.com.

[23] *See* AM. ACADEMY OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 17 (Dec. 2001). The monograph lists fifty-two asbestos-related bankruptcies. Several companies declared bankruptcy after the monograph was issued. *See also* Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, MEALEY'S BANKR. REP.: ASBESTOS 1 (Aug. 2001).

The current system of asbestos litigation has become unworkable. A wise federal judge in Pennsylvania recognized problems in asbestos litigation over a decade ago. He observed:

> Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure.[25]

In the decade that has passed since this statement was made, the situation has only become worse.[26] The current situation is a crisis not only for defendants, many of whom have already been forced into bankruptcy as a result of asbestos liability, but also for individuals who suffer or will suffer from asbestos-related injuries.

Due to the increase in asbestos claims, many seriously ill individuals may not receive timely or proper compensation. In addition, other claimants in the civil justice system may find "justice delayed" as they are forced to wait behind long lines of asbestos claims to have their day in court.

Ironically, the recent explosion in asbestos claims may have been prompted by the very mechanisms that were intended to help resolve asbestos claims more efficiently.[27] In order to help the truly sick have their claims heard promptly and to ensure that individuals will be compensated if their claims are successful, courts should reinstate the fundamental rules of justice that have been ignored for the sake of expediency in asbestos cases.[28]

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[24] *Asbestos Blob*, *supra* note 3; Susan Warren, *Halliburton Stock Falls Nearly 43% After Recent Asbestos Verdicts*, WALL ST. J., Dec. 10, 2001, at B2, *available at* 2001 WL-WSJ 29680262.

[25] *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir. 1986).

[26] *See* Edley Statement, *supra* note 7 (noting that between 1993 and 1999, "the already grim [asbestos litigation] situation . . . deteriorated").

[27] *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judg-*

This article will outline the practices that have led to the deluge in asbestos filings. Many of these practices, when originally adopted by the courts, appeared to be creative and helpful ways in which to curb excesses in asbestos litigation. We now know, however, that these practices have led to more asbestos filings rather than less. After explaining the problems with the current system, the article also proposes changes which, if adopted, could help courts resolve asbestos claims more equitably for injured plaintiffs who need compensation; these changes would also ease unfair burdens on judges.

I. THE UNINTENDED CONSEQUENCES OF EXPEDIENT HANDLING OF ASBESTOS CLAIMS

The recent increase in filings is easily explainable when one looks at the ways in which courts have attempted to deal with asbestos litigation. Many judges, overwhelmed with the number of asbestos cases on their docket, have allowed consolidation of claims that are totally different in kind, have shortened discovery procedures (if discovery is taken at all) and have allowed questionable scientific evidence to be presented in their courtrooms. As one judge has recently observed:

> Think about a country circuit judge who has dropped on her 5,000 cases all at the same time. . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The

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es: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases, 24 AM. J. TRIAL ADVOC. 247 (2000).

[28] *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); The Hon. Griffen B. Bell, *Asbestos Litigation and Judicial Leadership: the Courts' Duty to Help Solve the Asbestos Litigation Crisis*, at http://www.nlcpi.org/books/welcome.htm.

> judge does not purposely ignore, fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.[29]

Similarly, the Rand Institute for Civil Justice noted that in response to the large volume of asbestos litigation, beginning in the 1980s, trial courts looked for ways to "manage asbestos caseloads more efficiently so as to reduce public and private transaction costs."[30] Although, at the time, these efforts by judges were "widely admired and imitated by fellow federal and state court judges,"[31] hindsight has shown that making it easier to file asbestos claims has simply invited plaintiffs' lawyers to file thousands of additional claims.

Obviously, this is a bad result for our society. Sound public policy suggests that the focus of asbestos litigation should be directed toward holding defendants who are true wrongdoers responsible and compensating people who are truly injured. Instead, in some places the focus of attorney efforts has been on stockpiling cases, rather than pursuing compensation for seriously injured individuals.[32] Some plaintiffs' law firms have "built up 'inventories' of tens of thousands of asbestos cases."[33] Noted Mississippi plaintiffs' attorney Richard Scruggs has acknowledged that "[a]sbestos litigation has become a cottage industry . . . [s]ome attorneys are building their practices on these mass production inventory asbestos settlements."[34] Some firms, seeking to "buil[d] up [their] inventories" of cases, have attempted to recruit asbestos plaintiffs by driving through working class areas with vans set up with x-ray machines.[35] Plaintiffs can get a free x-ray to determine if they show any signs of exposure to asbestos in return for signing a forty percent contingency fee agreement.[36] One solicitation said: "Find out if you have MILLION DOLLAR LUNGS!"[37] It is doubtful that this type of solicitation, which sounds more like an advertisement for a lottery than an attempt to attract injured individuals, actually helps to reach individuals who are sick and who would not otherwise have sought out an attorney. It is far more likely that this type of solicitation merely assists plaintiffs' attorneys in "stocking up" on their "inventory" of asbestos claims.

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[29] *Fairness in Asbestos Compensation Act of 1999*: *Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 27 (1999) (statement of the Hon. Conrad L. Mallett, Jr., former Chief Justice, Michigan Supreme Court).

[30] STEPHEN CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 25 (Rand Inst. for Civil Justice ed., 2002).

[31] *Id.*

[32] *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36; Roger Parloff, *The $200 Billion Miscarriage of Justice*, *at* http://www.fortune.com/indexw.jhtml?channel=artcol.jhtml&doc_id=206477; Eric Roston, *The Asbestos Pit*, *at* http://www.time.com/time/magazine/article/0,9171,1101020311-214107,00.html (last visited Mar. 9, 2002).

[33] *See* Schmitt, *supra* note 4.

[34] *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, 17 MEALEY'S LITIG. REP.: ASBESTOS 1, 7 (Mar. 2002) [hereinafter *Medical Monitoring and Asbestos Litigation*].

A. *Compensation of Unimpaired Claimants*

One of the biggest dilemmas in asbestos litigation is how to handle unimpaired claimants—that is, plaintiffs who are not presently sick. Unimpaired claimants account for a large portion of new asbestos filings. One company has estimated that "as many as 80% of its asbestos settlements are paid to unimpaired people."[38] In addition, the Supreme Court of the United States has said that "up to one half of asbestos claims are now being filed by people who have little or no physical impairment."[39]

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[35] *In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 748 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d. Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (working in conjunction with unions, plaintiffs' lawyers have "arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque"); Eagle-Picher Indus. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when [the] suit is filed.").

[36] *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341.

[37] *See id.*; *see also In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. at 748.

[38] Queena Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12, *available at* 2001 WL-WSJ 2850312.

[39] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (quoting Edley & Weiler, *supra* note 2, at

In tort law, a plaintiff is traditionally required to demonstrate an injury before courts are willing to allow recovery,[40] so one might wonder how it is possible that a majority of the claimants in asbestos cases are unimpaired. The answer is twofold. First, courts are increasingly willing to recognize as an "injury" internal changes in a plaintiff that in some cases can only be seen on an x-ray and may never impair the claimant's health.[41] Second, some courts have been willing to recognize claims for medical monitoring in cases in which a plaintiff has been exposed to a hazardous substance but is not sick.[42]

There is a spectrum of injuries that can result from exposure to asbestos. Mesothelioma, which is linked to asbestos exposure, is a very serious disease and is often fatal. Lung cancer and asbestosis are two other sicknesses that can be caused by asbestos. The "injury" that is often attributed to unimpaired plaintiffs, however, is pleural thickening. Essentially, this means that the plaintiffs have some spots or markers on their lungs but may never become sick as a result of their exposure to asbestos.[43] In a recent Mississippi case, the plaintiffs' lawyer acknowledged that the plaintiffs did not actually have asbestosis but claimed that his clients were suffering from "shortness of breath and spots on the lung."[44] The same plaintiffs' lawyer conceded, however, that "most of [the plaintiffs] have not missed a day of work in their lives."[45] In addi-

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393). The American Academy of Actuaries estimates that more than 90% of claimants are alleging nonmalignant injuries. *See* JENNIFER L. BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS 1 (December 2001), *available at* http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf.

[40] *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (10th ed. 2000).

[41] *See, e.g., infra* notes 44-46 and accompanying text.

[42] *See infra* notes 58, 59 and accompanying text.

[43] *See The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the Senate Subcomm. on the Judiciary*, 106th Cong. 17-23 (1999) (prepared statement of Christopher Edley, Jr., Professor, Harvard Law School) (noting that plaintiff's sue "seeking compensation for pleural conditions which are a mere marker of asbestos exposure. Although these conditions can be detected by medical tests, they generally do not cause impairment to lung function and they are not early warning signs of more serious conditions such as cancer.").

[44] *See* Jerry Mitchell, *Staggering Jury Verdicts Draw Calls for Tort Reform*, CLARION-LEDGER (Jackson, Miss.), Oct. 30, 2001, at A1.

[45] *Jury Awards $150 Million in Asbestos Case*, ASSOC. PRESS NEWSWIRE, Oct.

tion, one of the plaintiffs, a senior citizen, acknowledged that he walks three to four miles daily.[46] Therefore, because courts have allowed "spots" on an x-ray to fulfill the requirement that a plaintiff show an injury, plaintiffs are being permitted to bring suits in cases in which the plaintiff is not presently sick and may never become sick.

Another way in which unimpaired claimants have been allowed to proceed in the tort system is by asking courts to recognize a new cause of action for medical monitoring. In *Metro North Commuter Railroad Co. v. Buckley*,[47] the United States Supreme Court considered, and rejected, a claim for medical monitoring under the Federal Employers' Liability Act (FELA). The plaintiff, Michael Buckley, was clearly exposed to asbestos. Mr. Buckley maintained the steam tunnel pipes in New York City's Grand Central Terminal.[48] As a pipefitter, Mr. Buckley "hammer[ed], slice[d] and pull[ed]" asbestos-containing insulation off of pipes, releasing asbestos fibers into the air.[49] Asbestos dust so thoroughly covered Mr. Buckley that he testified that he could taste it in his mouth, and he and his fellow workers were called "the snowmen of Grand Central."[50]

Yet despite Mr. Buckley's exposure to asbestos, the Supreme Court declined to recognize a tort law cause of action for Mr. Buckley's medical monitoring costs.[51] The Court reasoned that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring."[52] Current estimates indicate that the number of individuals exposed to asbestos is probably near 27 million.[53] In a medical monitoring claim, that exposure alone entitles an individual to a remedy. Therefore, under

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28, 2001, *available in* WL APWIREPLUS.

[46] *See* Parloff, *supra* note 32, at 154.

[47] 521 U.S. 424 (1997).

[48] *Buckley*, 521 U.S. at 446.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 440.

[52] *Id.* at 442.

[53] CARROLL ET AL., *supra* note 30, at 13. The American Academy of Actuaries estimates that as many as 100 million people in the United States may have been exposed to asbestos. *See* BIGGS ET AL., *supra* note 39.

a medical monitoring theory each of those 27 million individuals may be entitled to a remedy, whether they are injured or not. As the Supreme Court has indicated, however, recognition of medical monitoring could lead to "a 'flood' of less important cases (potentially absorbing resources better left available to those more seriously harmed)."[54]

Although the Supreme Court refused to recognize medical monitoring under FELA, a federal statute, the supreme court of each state is still empowered to determine whether medical monitoring will be recognized in that state.[55] States that have recently addressed medical monitoring, such as Nevada,[56] Alabama[57] and Kentucky[58] have concurred with the reasoning of the United States Supreme Court in *Buckley* and refused to recognize it as a cause of action. There are still a minority of states that recognize such claims.[59] In the states that have recognized medical monitoring, one of the ways in which it has been used is to bring claims on behalf of individuals exposed to asbestos.[60]

The relaxation of the injury requirement provides only a partial explanation for the increase in unimpaired claimants. There are other reasons for the rise in claims by unimpaired claimants. In some cases, concerns about the statute of limitations may prompt lawyers to file suit on behalf of claimants before the claimants are actually sick. As one court has observed, some unimpaired claimants file claims "because they are aware of the latent and progressive nature of asbestos-related disease and because they fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability."[61] Another reason may be that plaintiffs' lawyers are aware that many traditional asbestos defendants are going bankrupt and wish to seek compensation now out of fear that it will not be available later. Finally, some plaintiffs' lawyers may be aware of the huge awards being given to other unimpaired plaintiffs and think "why wait for an injury to manifest itself if I can receive compensation now?"[62]

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[54] *Buckley*, 521 U.S. at 442.

[55] *See generally* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057 (1999); James A. Henderson & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002).

[56] *See* Hinton v. Monsanto Co., 813 So. 2d 827 (2001).

[57] *See* Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2001).

[58] Wood v. Wyeth-Ayerst Labs., 2002 WL 1940664 (Ky. Aug. 22, 2002).

[59] *See, e.g.*, Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

[60] *See, e.g.*, Dragon v. Cooper/T. Smith Stevedoring Co., 98-1375 (La. App. 4 Cir. 1/6/99), 726 So. 2d 1006 (permitting a class action for medical monitoring for seamen exposed to asbestos).

Although a plaintiff may have legitimate reasons for desiring to file suit when he or she is unimpaired, allowing cases with unimpaired claimants to proceed is unsound public policy. As the United States Supreme Court has clearly recognized, these cases crowd court dockets and make it more difficult for courts to adjudicate the claims of truly injured individuals. As the Supreme Court appricated, when unimpaired claimants are successful, their claims divert resources away from seriously ill individuals in order to compensate individuals who may never become sick. As a bipartisan federal study has noted, "[t]here is a risk . . . that satisfaction of relatively minor claims may exhaust assets that ought to be preserved for more serious claims."[63]

B. Mass Consolidations

Mass consolidation of cases is one of the innovative mechanisms that courts have developed in order to deal with asbestos litigation. In the mid-1980s judges began to allow cases to be consolidated because it promoted efficiency and allowed judges to dispose of many cases at once.[64] Initially, judges allowed small scale consolidations in which there were "very similar liability issues . . . and careful attention [was paid] to the precise claims raised by each plaintiff against each defendant."[65] Due to the success of the small consolidations and the increasing numbers of asbestos cases being filed in their districts, judges subsequently allowed massive consolidation of cases. One of the most notable mass consolidations was a Mississippi case in which there were 1738 plaintiffs from around the country consolidated into one case.[66] After the trial of twelve plaintiffs resulted in a jury verdict of $48.5 million, the judge pressured the defendants into settling the remainder of the claims on terms that the defendants thought were particularly harsh.[67]

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[61] *In re* Asbestos Cases, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991).

[62] *See* Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA TODAY, July 15, 1999, at A17, *available at* http://www.usatoday.com.

[63] *See* Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States, 187 F.R.D. 293, 303 (1999)

[64] *See The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 89-104 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School).

Similarly, in 1999, the West Virginia Supreme Court established a Mass Litigation Panel to streamline the handling of the more than 25,000 asbestos cases pending in that state.[68] According to the plan established by the West Virginia Supreme Court, all pending asbestos cases would be resolved in 2002 through "mass trials."[69] Three defendant railroad companies and an underwriter objected, noting that disposing of such an enormous number of cases in such a short amount of time would effectively prevent the defendants from interviewing plaintiffs or having them examined by doctors.[70] As a result, the companies filed a federal lawsuit against West Virginia, claiming that the Mass Litigation Panel denies them due process of law. Despite the lawsuit filed by the defendants, however, Judge Martin Gaughan recently entered an order scheduling mass trials for "all asbestos cases pending between the parties," with the trial set to begin on September 23, 2002.[71]

Notably, of the 5000 cases that have been filed against the three railroads in West Virginia, 4400 have been brought by plaintiffs "who do not work, live or pay taxes in West Virginia."[72] Moreover, fifty-seven percent of the cases pending against the railroads nationwide have been filed in West Virginia.[73] The high percentage of cases filed by out-of-state plaintiffs suggests that "efficient" handling of asbestos claims does not help courts dispose of cases, it merely attracts more cases.

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[65] *Id.* at 91.

[66] *Id.* at 93.

[67] *Id.*

[68] *See* W. VA. TRIAL CT. R. 26.01; *see also* Michelle Saxton, *Railroads File Lawsuit Against W. Va. Supreme Court*, ASSOC. PRESS NEWSWIRE, Nov. 29, 2001.

[69] *See* Saxton, *supra* note 67.

[70] *See id.*

[71] *See In re* West Virginia Asbestos Personal Injury Litigation, 01-C-9000 (Cir. Ct. Kanawha County, W. Va. Feb. 26, 2002) (Trial Scheduling Order).

The efficiencies that were created by consolidating cases ten or fifteen years ago are now overshadowed by the inequities that result from enormous consolidations. In these mass consolidations, impaired claimants are mixed with unimpaired claimants, and the plaintiffs who may not have been exposed to asbestos at the same time or place are lumped together in the same case. Consolidation of these cases does not promote efficiency; it merely forces defendants to settle. In addition, consolidation of impaired claimants with unimpaired claimants is bad for the impaired plaintiffs because they often end up receiving smaller awards than they would if their cases were considered individually.[74] As Professor Christopher Edley of Harvard Law School has noted:

> [L]oading a large number of [impaired and unimpaired] claims together produces a bet-the-company risk for the defendants, making settlement more likely. In the settlement, then, the higher potential jury-award value of the impaired claims is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims.[75]

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[72] Dennis O'Brien, *Norfolk Southern Sues W. Va. over Asbestos Ruling*, VIRGINIAN-PILOT & LEDGER-STAR, Nov. 30, 2001, at D1.

[73] *See id.*

[74] *See id.*; Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 507 (1994) ("Those with serious cancer diseases want their cases pressed first and most strongly. Clients with generally less serious asbestosis and pleural-plaque symptoms do not want to wait, even though their damage is less severe. All of these cases cannot be tried at one. Mixing the cases for trial and settlement may result in a lower recovery for the more seriously injured, but generally it will result in a quicker fee for counsel.").

[75] Edley Statement, *supra* note 7, at 33.

Mass consolidations are not only unsound because impaired claims and unimpaired claims are often mixed. The cases are also unsound because they raise the question of whether, in groups of thousands of plaintiffs, the attorneys involved can adequately represent each of the plaintiffs. For example, in one case, a group of asbestos defendants reached a settlement with a group of 4000 plaintiffs in five states.[76] When the awards to the various groups of plaintiffs were leaked to the public, it appeared that the amount of the awards depended more on where the plaintiffs lived than on their injuries.[77] Plaintiffs from Mississippi, the state in which the case was brought, each received, on average, $263,000.[78] The Texas plaintiffs, the closest group of out-of-state plaintiffs, received $43,500 each.[79] Over 2500 plaintiffs who lived farther away (in Ohio, Indiana and Pennsylvania), but were just as badly injured, received only $14,000 each.[80] The disappointed plaintiffs are now suing the attorneys who created this unbalanced settlement.[81]

C. Abandoning Procedural and Evidentiary Principles

In an effort to streamline asbestos litigation procedures, many courts departed from traditional procedural and evidentiary principles in asbestos cases. In some jurisdictions, basic discovery procedures are virtually nonexistent. Judges, in an effort to move cases through their dockets have pressured defendants to settle asbestos cases, even in cases where defendants may not have even had a chance to conduct basic discovery regarding the plaintiffs.[82]

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[76] Stephen Labaton, *Settlement Reached in Huge Asbestos Case; But Unequal Awards to Victims Inspire Talk of Legislation to Fix System*, MILWAUKEE J. SENTINEL, Jan. 23, 2000, at 13A, *available at* 2000 WL 384759.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See* Huber v. Taylor, No. 02-304 (W.D. Pa. Feb. 6, 2002).

[82] *See, e.g.*, Cosey v. E.D. Bullard Co., Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County Sept. 16, 1998). In the mass consolidation *Cosey* case in Mississippi,

In addition, many courts are allowing questionable "expert" evidence to be presented in support of asbestos claims. In *Daubert v. Merrell-Dow Pharmaceuticals*[83] and *Kumho Tire Co. v. Carmichael*,[84] the United States Supreme Court sent a clear message to federal judges that they must take an active role as a "gatekeeper" in the courtroom and filter out unreliable scientific evidence. The Supreme Court's imperative naturally applies in asbestos cases, where the judge's gatekeeper role may be particularly important with regard to testimony regarding the possible causes of a plaintiff's alleged illness. In fact, the legitimacy of expert testimony suggesting that the defendant's pharmaceutical product was a cause of an illness was at the heart of the *Daubert* case. In mesothelioma cases, causation may not be questioned because mesothelioma has been almost exclusively identified with asbestos exposure.[85] Yet other diseases that can be caused by asbestos, such as lung disease, can also be caused by a variety of other factors.[86]

The *Daubert* rule was based on the Federal Rules of Evidence and does not apply automatically to state judges. Nevertheless, the rules of evidence in most states are virtually identical to those that apply in federal courts. For example, in *E.I. duPont de Nemours & Co. v. Robinson*,[87] the Texas Supreme Court adopted *Daubert* as the relevant standard for evaluating

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the judge, after the trial of twelve plaintiffs, forced the defendants to settle the cases of nearly 2000 other plaintiffs. *See* Schwartz & Lorber, *supra* note 27, at 255.

[83] 509 U.S. 579 (1993).

[84] 526 U.S. 137 (1999).

[85] Recently some scientists have questioned whether Simian Virus 40 (a virus apparently contained in certain polio vaccines given to individuals in the 1950s) is a contributing factor in the development of mesothelioma. *See, e.g.*, C. Mulatero, *Simian Virus 40 and Human Pleural Mesothelioma*, 54 THORAX 60 (1999), *available at* http://www.thorox.bmjjournals.com.

[86] *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 44 (1999) (prepared statement of Alex G. Little, M.D., past president, American College of Chest Physicians) (stating that mesothelioma "is usually associated with a history of asbestos exposure" whereas "[l]ung cancer has several known causes" and "[c]onsiderable evidence exists to suggest that such 'other' cancers in fact are not caused by asbestos).

[87] 923 S.W. 549 (Tex. 1996).

expert testimony under the relevant Texas Rule of Evidence.[88] Like the United States Supreme Court, the Texas Supreme Court emphasized the important role trial judges play in screening out unreliable expert testimony.[89]

At least one trial court judge in Texas has taken the directives of the United States Supreme Court and the Texas Supreme Court seriously. Recently, Judge Jim Lovett of Lamar County, Texas, applied the *Daubert/Robinson* standard to testimony that was being offered by two "asbestos experts" and found that the proffered testimony was based on "junk science."[90] Judge Lovett ruled that the testimony of the two experts would not be allowed in any pending or future cases filed by the plaintiffs' law firm.[91] Judges who are conscious of their role as a gatekeeper in asbestos cases are not only displaying good judgment in following the advice of higher courts; they are also furthering sound public policy by discouraging baseless lawsuits from being brought in the courts.

D. *Improper Defendant Identification*

It is no secret that as the "traditional" asbestos defendants go out of business, plaintiffs' attorneys have begun to look for a new "generation" of asbestos defendants. Prominent Mississippi plaintiffs' lawyer Richard Scruggs has critically described the problem as the "endless search for a solvent bystander."[92] Mr. Scruggs also recognized that "[m]ost of the companies that were culpable in promoting the sale of asbestos-containing products have been held accountable, and most of them have gone bankrupt."[93] Another asbestos lawyer openly has acknowledged that he is "trying to turn this litigation away from its traditional targets."[94] In a recent study, Rand noted that in 1983, approximately 300 companies were defendants in asbestos litigation.[95] Rand estimates that today, there are over 6000 companies that are defendants in asbestos litigation.[96]

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[88] *See Robinson*, 923 S.W. at 556.

[89] *See id.* (noting that "[t]he trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards" of *Daubert*).

[90] *Expert Testimony Stricken from Pending, Future Asbestos Cases in Lamar County, Texas*, 16 MEALEY'S LITIG. REP.: ASBESTOS 9 (July 2001).

[91] *Id.*

[92] *Medical Monitoring and Asbestos Litigation*, *supra* note 34, at 1, 5.

[93] *Id.*

One problem with the ever-widening scope of defendants in asbestos litigation is that some defendants are being held liable where there is little evidence that their product harmed a claimant. In Texas, one company was found liable for damages simply because the plaintiffs testified that they remembered seeing the defendant company's sealant around the refinery where they worked.[97] Similarly, a jury imposed a $90 million jury verdict against 3M Co. (the company that produces Post-it® notes) because respirators made by the company, which were labeled for nontoxic use, were alleged not to have completely protected the plaintiffs from asbestos-related illnesses.[98]

II. RESTORING THE RULE OF LAW

The solution to the asbestos problem, if there is to be one, will most likely have to come from the states, particularly the state courts. The Supreme Court has made it clear in *Amchem Products, Inc. v. Windsor*[99] and *Ortiz v. Fibreboard Corp.*[100] that it will not approve mass settlements of asbestos cases under Rule 23 of the Federal Rules of Civil Procedure. To date, Congress has failed to enact legislation to address this problem, despite calls for such legislation from the Supreme Court[101] and the Judicial Conference of the United States.[102] While additional measures may be introduced in Congress, until Congress acts, the solution to the problem lies with the state judges before whom most asbestos cases are brought. There are a number of measures that judges can take in order to discourage individuals who may have been exposed to asbestos, but are not sick, from bringing claims in their courtrooms.

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[94] Schmitt, *supra* note 4.

[95] *See* CARROLL ET AL., *supra* note 30, at 49. A.M. Best estimates that "the defendant pool has increased to more than 2,400 companies." *See* Raji Bhgavulta, *Asbestos: A Moving Target*, BEST'S REVIEW, *at* http://www.bestreview.com/2001-09/pc_asbestos.html (last visited Feb. 19, 2002).

[96] *See* HENSLER ET AL., *supra* note 30, at 49.

[97] *The Asbestos Blob*, WALL ST. J., July 2, 2001, at A14, *available at* 2001 WL-WSJ 2868353.

[98] *See id.*

[99] 521 U.S. 591 (1997).

[100] 527 U.S. 815 (1999).

[101] *See Ortiz*, 527 U.S. at 821 (noting that the asbestos problem "defies customary judicial administration and calls for national legislation").

[102] *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to*

A. *Stop Mass Consolidation*

The theory behind consolidation is that it saves time and resources for both the court and the parties involved. Today, however, mass consolidation often results in a few cases of truly sick individuals being mixed with hundreds or thousands of cases involving unimpaired claimants. In most cases, defendants faced with hundreds or thousands of claims that have been amassed in one case will settle, regardless of the individuals merits of each case. As Judge Jack Weinstein, perhaps the most experienced jurist in the United States in providing oversight to settlements in mass tort cases such as asbestos, DES and Agent Orange, has noted:

> Often the pressure for block settlements comes from plaintiffs' attorneys who hope to get something for a large mass of questionable cases. Some attorneys are selective about the cases they take, while others will take almost any case without regard to its merit, hoping for a global settlement. The attorneys with thousands of cases are almost invariably in this second category.[103]

The solution to the mass consolidation issue is relatively straightforward and simple: courts should not permit mass consolidation of asbestos cases, especially in cases where the consolidation will result in mixing unimpaired claimants with impaired claimants.

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the Chief Justice of the United States and Members of the Judicial Conference of the United States, 6 MEALEY'S LITIG. REP.: ASBESTOS 3 (Mar. 1991) (concluding that federal legislation is needed to solve the asbestos litigation problem).

[103] Weinstein, *supra* note 74, at 521.

B. Apply Sound Science

Courts need to apply sound standards in order to determine if a plaintiff is suffering from an asbestos-related disease. Some asbestos claims have been allowed based upon plaintiffs' subjective claims, rather than sound medical criteria.[104] Independent organizations, such as the American Thoracic Society of the American Medical Association, have adopted objective minimum criteria for determining if a plaintiff is suffering from an asbestos-related disease. Although these standards are set by an independent organization with no bias toward defendants, in many asbestos cases medical screeners have diagnosed asbestos-related "injuries," where plaintiffs failed to meet minimum diagnostic criteria set by the American Thoracic Society.[105] In response to the questionable scientific methods employed in many mass screening cases, Senior United States District Judge Charles R. Weiner, who oversees the federal multidistrict asbestos litigation that has been consolidated in the Eastern District of Pennsylvania, has recently issued an order that all cases initiated through a mass screening shall be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.[106] His ruling should be followed elsewhere.

According to Rand, approximately 27 million individuals have been exposed to asbestos.[107] Many of those individuals, thankfully, will never become ill. Courts must carefully consider, which of those exposed individuals have been injured and need compensation. Objective criteria, such as that set forth by the American Thoracic Society, should be used in evaluating whether a plaintiff has an asbestos-related disease.

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[104] *See, e.g.*, *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 3063, 1566 (D. Haw. 1990) (noting that cases are often diagnosed based on "subjective declarations of shortness of breath, tiredness and general lassitude," rather than objectively observable clinical findings).

[105] *See, e.g.*, Raymark Indus. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *2, *8, *22 (D. Kan. May 30, 1990) (finding that medical screeners disregarded standards set by American Thoracic Society and reported that workers had asbestos-related "injuries" despite the fact their medical readings had no clinical significance, and stating that the screening program produced a "steady flow of faulty claims" and a "fraud on the court").

[106] Administrative Order, *In re* Asbestos Prods. Liab. Litig. (No. VI) (E.D. Pa. Jan. 16, 2002) (MDL875).

[107] *See* CARROLL ET AL., *supra* note 30, at 13.

C. Require Plaintiffs to Prove Their Injuries Were Caused by the Defendants in the Case

The search for new defendants is not surprising, especially if one considers that some attorneys have made a business out of pursuing claims of unimpaired claimants. With increasing numbers of unimpaired claimants and decreasing numbers of solvent manufacturers and sellers of asbestos-containing products, for some plaintiff attorneys the solution is to find new defendants. Plaintiffs' attorneys are "'cast[ing] the litigation net further' in an endless effort 'to find corporate pockets deep enough to satisfy the vast numbers of pending and future tort claims.'"[108]

The problem with this strategy is that in the early stages of the asbestos litigation, the culpability of the defendants was clearly established. For the new generation of defendants, however, their culpability is much less clear. Nevertheless, these peripheral defendants are being dragged into the asbestos litigation morass and hit with multi-million dollar verdicts, even though they never manufactured or sold asbestos. Plaintiffs should be required to provide proof that they were harmed by a product made or marketed by a specific defendant.

D. Use an Inactive Docket System

As noted above, the Rand Institute for Civil Justice estimates that approximately 27 million individuals have been exposed to asbestos.[109] Common sense indicates that each of the 27 million individuals who have been exposed to asbestos cannot be compensated with a multi-million dollar verdict, particularly since most of them will never get sick. Yet many claimants are filing cases before they are actually impaired. As legal scholars have noted, "While there are understandable legal and emotional reasons why these premature suits are being filed in huge numbers, their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now."[110]

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[108] *See* Edley Statement, *supra* note 7, at 28.

[109] CARROLL ET AL., *supra* note 30, at 13.

One way in which courts have dealt with the claims of unimpaired claimants is through the use of inactive dockets.[111] Inactive dockets are "judicially-managed docketing and calendaring systems that alter the priority of trials of asbestos cases."[112] The Commonwealth of Massachusetts,[113] Cook County (Chicago), Illinois,[114] and Baltimore, Maryland,[115] have each established an inactive docket system. Although the inactive docket systems vary slightly, the basic idea is the same.[116] Plaintiffs who have been exposed to asbestos can register with the inactive docket. Once the plaintiff registers with the inactive docket, the statute of limitations is tolled and will not run on the individual's claim. If, at a later date, the plaintiff develops asbestos-related injuries, or mesothelioma or other cancers, the plaintiff's case may be moved from the inactive docket to active docket. At that time, the plaintiffs case may proceed.

Some have suggested that inactive dockets are a bad idea because if plaintiffs are required to wait until they actually become injured in the future, the defendants will have gone bankrupt. Based upon the recent string of defendant bankruptcies, however, it is virtually certain that if courts do *not* stop paying unimpaired claimants, if and when future claimants become ill, the present defendants will almost certainly have gone bankrupt long ago.

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[110] Edley & Weiler, *supra* note 2, at 393.

[111] *See* Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001); *Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, COLUMNS—ASBESTOS: RAISING THE BAR IN ASBESTOS LITIG. 2 (Feb. 2002) (discussing various inactive docket plans and reporting that state judges who oversee asbestos dockets in states with inactive dockets find the plans fair and effective); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 568 (1992).

[112] *See* Schuck, *supra* note 111, at 542.

[113] *See* Commonwealth of Mass., Middlesex Superior Court, "Massachusetts State Court Asbestos Personal Injury Litigation Order," Sept. 1986 (on file with authors).

[114] *See* Order to Establish Registry for Certain Asbestos Matters, *In re* Asbestos Cases (Cir. Ct., Cook County, Ill. Mar. 16, 1991).

[115] *See* Order Establishing an Inactive Docket for Asbestos Personal Injury Cases, *In re* Asbestos Personal Injury and Wrongful Death Asbestos Cases, No. 9234451 (Cir. Ct., Baltimore, Md. Dec. 9, 1992).

[116] Behrens & Parham, *supra* note 111.

III. Stop Retribution Against Defendants Who Try to Enforce Their Legal Rights

One of the more disturbing aspects of asbestos litigation is that if defendants try to enforce their basic legal rights, they are sometimes threatened by plaintiffs' lawyers with a "claim dump" of hundreds or even thousands of claims. If asbestos defendants make motions to dismiss or move for summary judgment, they may be singled out and penalized by plaintiffs' lawyers. The same is true if defense counsel insist on plaintiffs relying on good science, a right guaranteed to defendants in most jurisdictions. If defendants utilize discovery procedures that are proper, they may be punished. If they move to break up joinder of cases that are dissimilar, they may be punished. Judges should encourage defendants to exercise their legal rights and should discourage retaliatory case filings.

IV. Conclusion

State trial and appellate judges could make a great deal of progress in addressing the current asbestos litigation crisis. Putting a premium on expediency and efficient resolution of cases made sense at one point in the history of asbestos litigation, but now that approach is leading to an extraordinary number of new asbestos filings. These filings are often made by lawyers representing unimpaired persons bringing claims against peripheral defendants.

State court judges can stop this onslaught of claims by enforcing very basic rules of law. The changes to the current asbestos litigation system suggested in this article would not hinder the ability of sick individuals to receive compensation for their asbestos-related diseases. To the contrary, they will help sick claimants have their claims heard and resolved quickly and fairly. By these simple actions, judges can stem the tide of bankruptcies, preserve defendants' assets, help truly injured plaintiffs and create a fair resolution to the ever-growing asbestos litigation crisis.

MR. MCGOVERN: It's always a great pleasure to be in the presence of the master of torts, and it's a great pleasure for me to be here. Charles, thank you very much, and I noticed on the cover of the program there's a quote from Francis Hare. For ten years or so I was the Francis Hare Professor at the University of Alabama. As Tom mentioned, I was down in Pascagoula at a time when my good friend Dickie Scruggs had only one boat. And I see Brad Reynolds who is in the Justice Department and agreed to have me serve as a special master with him on one side and Judge William Wayne Justice on the other. So I have been in the fire and out of it, up one side and down the other. I feel like one of the gray hairs of asbestos. In fact, the Jackson case you may remember was argued by Scotty Ball. Francis Hare's son, brother, and Francis Scott Baldwin, and I wrote a book, the only book ever written by three Francises in the history of the world. So it really is fun to be here.

I've been asked to kind of fly at about 20,000 feet for a second and see if we can look at what has been going on here and maybe our understanding of what's been going on will drive what we should do about it, if anything. And it seems to me that there are four separate visions of what's been going on with asbestos in general but Mississippi in particular. Three are perceptions in large part by the defendants, one from the perspective of the plaintiffs. You pick yours. The solutions are very different depending upon the different conception that you have.

Theory number one—Victor and I were talking about it last night. Back—and I think Tom laid the basis for us—back when I was a special master in *Jenkins v. Raymar* back in the early days of Pascagoula, back in *Borel v. Fiberboard*—and Victor reminded me of Vashotta. Those of us who were working as neutrals with the court system, those of us who were judges who were trying to do the best you could to resolve cases saw in front of them, under this first vision of the world, folks that were really sick, folks who deserved to get money and folks who weren't getting money because the court system was pretty clogged or traditional kinds of concepts of causation were very difficult to prove or exposure—when you are exposed to lots of different substances over a period of time, it was hard to prove. And so the argument in this vision goes that judges kind of bent the law a little bit. They pushed the law to make some asbestos exceptions, to make it easier for plaintiffs to recover, to make it easier for the cases to move through the system. If you believe that, then your solution, in effect, is to rewrite history. If you believe the cases now are not the same kind of serious cases that existed when this law was put together, if you think these cases are not the same in Calvary, if you think the assumptions are different, then the kind of strategy we see being conducted with some of the bankruptcies, for example, where bankruptcy judges are being asked to use *Daubert*, to use strict causation, to use strict exposure, to use [Federal Rule of Evidence] 706 experts to try to nail down injuries, in effect to rewrite history, that that's the kind of approach. If the problem is with the fact that the law was bent, then what you need to do is change the law based on differing assumptions about the people that are going through the system.

Vision number two, also from the defense perspective, and I would argue from some of the plaintiffs as well, is that the law really didn't change very much with asbestos. You didn't see market share liability being adopted. You didn't see offensive collateral estoppel. What's changed are the practices or customs of the litigation. We see, in effect, market share liability when groups of folks got together like ACF, the Wellington Group, and decided to chop up the liability. We see folks once they get hit over and over and over again deciding that yes, they probably are liable, therefore, they will pay out. And so what we see are practices.

Even if a court didn't aggregate cases, we see settlements that are phenomenally aggregate where, for example, one of the companies that's in bankruptcy used to go ahead and settle cases. All you had to do was send in a minimum amount of information, and the cases would be settled on a routine basis even before lawsuits were filed. How could you have more of an aggregation in a settlement deal that we agree to pay you for any case you bring? So the argument under the second vision is what's happened is the practices and customs have, in effect, invited people to file more and more and more cases. And the assumption that you could get through the litigation bubble has not been correct; that instead it's a very highly elastic mass tort—the kind of tort that you can potentially find large numbers of plaintiffs.

The concept is sort of like the economic concept of demand elasticity. If you were to build a lot of, to use the phrase of the moment, BMW cars and sell them for a very small number of money, the demand would be elastic. Lots more people would buy them. If you were to make lots more castor oil I doubt if the demand would go up a whole lot. In the sense of the asbestos cases, if you move these cases through the system very quickly, low and behold, it's very elastic. There will be more as opposed to an airplane crash accident where the number of potential defendants is inelastic. In an elastic mass tort that kind of custom doesn't seem to work real well.

The third vision—and the one we're hearing the most of today—that everything's generally speaking okay. It's just a couple of pockets of jurisdictions where there are real problems. And if one would be able to change the venue rules, if one would be able to change the consolidation rules, if one were to be able to change the bonding rules in those particular pockets, then you wouldn't have the same problem: The rest of the country is doing just fine.

And the fourth vision, which is typically a plaintiff's vision, and I think David has mentioned some of this, is that the documents, the facts, the history of the use of asbestos is so egregious that when a case is tried to a jury and the jurors see the conduct, the history, the documents—everyone has heard about asbestos. It's not very difficult even in minimal injury cases to find jurors awarding large sums of money. That—the problem under this particular vision is that the facts are such that there is just liability; that the public has been conditioned that asbestos is something that warrants liability; and as a result in the trial of a case, it's simply quite difficult for a defendant to win. And I would suggest to you that in devising your solution to the problem you take into account what your vision is of what's really wrong here. And in all probability it might be a little bit of each of these; that there are certain things that are right and certain things that are wrong, and on balance you can come up with a measured type of approach. But I think it is helpful for you to take that kind of analysis with you in trying to understand what's going on. And I gave Tom one of my minutes, and I'll give it back.

MR. ANDRUS: All right. Thank you. I just want open it up to the floor. Any questions?

QUESTION: Charles Hewins with the Law School, the first is for Mr. McCormick. What is the likelihood that exposure to asbestos—like without a present injury right now—what's the likelihood that in the future there will be some sort of quantifiable injury? And if that's high, the next question is for Mr. Schwartz—something I was a little unclear about from your discussion. If it is a reasonable likelihood, who would these injured parties litigate against twenty years from now if the asbestos companies are out of business? Assuming you use the registry system to beat the statute of limitations.

MR. MCCORMICK: Let me take a stab at the first question and maybe a little bit of the second one as well. First of all, to answer and say whether or not somebody's exposure to asbestos is going to cause them to sustain a compensable injury or an injury where there's shortness of breath or they get mesothelioma is next to impossible to say. Statistically, and, Tom, you correct me if I'm wrong, I think in—generally speaking in a population base where you have high exposure to asbestos that approximately one to three percent of those people will come down with mesothelioma. Rick, you know the medicine probably better than I do. But that is generally what you will find. For example, in shipyard populations, and I think Dr. Sellacoff in '64 did a lot of studies, and I think that's generally accepted in that type of exposure that that is the significance or the seriousness of an injury ratio. You will have another seven to eight percent that develop lung cancer, and the rest of them would be asbestosis in varying degrees, some more severe cases and then others less debilitating and some with what people call the plural registry which I think you heard earlier today which, in essence, was operated by some courts to say if there is no demonstrable pulmonary dysfunction that we put that on a shelf and wait for it to go forward.

So to answer your question, generally speaking, cancer in a highly exposed population of some form is going to be in the neighborhood of eight to ten percent. And I have found—we've talked about who is going to be left. I served on a couple of bankruptcy committees. I'm not sure any of them are going to be left. I used to not believe that, but the downturn in the economy—when you have watched what's happened to some of these companies, it's not just an asbestos problem. When the interest rates went up, that's when Owens-Corning went down because they were a building supplier. And when the money that was flowing in that helped fund part of the settlements dried up, so did their profits, and they had to take a different course.

So the idea of bankruptcy with a lot of these defendants, Federal Mobile, for example, when the car industry went down—it's not as simple as just an asbestos problem. It is both an economic downturn and an asbestos problem which complicates trying to determine who is going to be left. I certainly think General Electric and some others will be around and everybody's got their different opinions. We'll still see some more bankruptcies, but there will still be some companies that were involved in this asbestos situation for years to come.

MR. SCHWARTZ: I find myself in agreement with Mr. McCormick to a great extent here. There will be some companies around. The more peripheral, the more circles we go out—for example, General Motors has been brought in to some of these cases and the probability is that General Motors will be around. But if you award $25 million to somebody who's highly likely not to be sick—the statistics we just got are one to three percent or eight percent to each person—you are going to increase the likelihood that more and more companies will be bankrupt leaving those who are truly sick with no remedy whether they are in the registry or not in the registry. If we take one figure, the Rand figure, we're talking about 2.5 million people. If we take the figure given by this prominent and respected plaintiff's lawyer, he says if he could do the x-rays, 25 million people have been exposed. So the registry approach in light of those facts, it's not a highly probable thing that the people that we're talking about who are exposed are going to get a serious disease. If we can find and identify, we don't make them play a game where it's unfair because they kind of know they've been exposed, and they could lose their claim. It works out for society; it works out for the victims.

I just mention, again, the real problem that plaintiffs' attorneys have told me is that they, themselves can't do much about it. A person comes to them with a claim, and they agree to represent that person. Now, they can't go into court and say this person should be put into a registry. That's not representing your client to the fullest extent possible. That has to be done by the judges themselves.

MR. TARDY: Speaking to the initial question, the key factor in asbestos exposure and really asbestos litigation is dose. It's—everybody has been exposed to asbestos. As we all sit in here today, each and every one of us have asbestos fibers in our lungs, literally millions of asbestos fibers in our lungs. But the difference is in the dose. In the 1950s, '60s and '70s asbestos was everywhere. It was used in every product that provided insulation qualities. And the people who worked with asbestos were heavily, heavily exposed; and, therefore, they were at great risk of getting an asbestos-related disease. Most of the diseases are based on the amount of asbestos that you get. So we can argue that each and every one of them are based on the amount of asbestos.

Beginning in 1972 with the promulgation of OSHA, all the traditional asbestos defendants took that mineral out of insulation so the amount of exposure that even they got in 1972 forward has diminished substantially. Therefore, the risk of disease for each and every person who even worked in the shipyard diminishes substantially each and every year you go out past 1972. So the chances of anybody—I mean, you will not get asbestos disease if the only thing you ever breath in the air here. Asbestos is the state rock of California. It's ubiquitous. You'll find pockets of asbestos minerals in various states. In some areas of the country they pave roads with asbestos, and, of course, it's been in brakes forever. So this is a naturally occurring quantifiable amount of asbestos fibers in the air. So each and every year that's gone out past 1972, the risk of anybody getting asbestos disease should diminish substantially; and, therefore, the number of people who have serious diseases should also diminish drastically.

MR. MCCORMICK: I think at this point though we're probably at the height of people that we're seeing come in with mesothelioma. I know in my own office, I have seen more people call and come in that have mesothelioma than I did four or five years ago. So I think that we are probably towards the top of that curve. I don't know how long it lasts, but I think statistically for the next—these past two or three years and maybe for the next three to five we're probably at the stage where you will see quite a number of serious mesothelioma cases just by the latency period, and you don't really have to have as much exposure to contract mesothelioma as you do a true asbestosis case which is more dose related.

MR. MCGOVERN: Going back to the second part of your question which I think is really quite excellent. From a public policy perspective, what do we do about the problem of this stream of folks? Do we put them on ice? The money may not be around. If we don't put them on ice, the money might not be around. Probably the best solutions will not occur from a public policy perspective and that is federal legislation with some type of umbrella that could protect the tort system, but at the same time ensure that there is a long-term stream of money available. It looks like class actions are not available as a potential solution after *Adcam* and *Orteze*. We had a meeting at the University of Chicago a couple of weeks ago with the advisory committee on rules to see if there might be some changes. I doubt it. But there is some interest on the part of some defense lawyers to redoing *Adcam*. So there may be a possibility of something happening along that line although I think it's going to be quite difficult.

The most prominent position right now even for companies who are not defunct is to go into bankruptcy and to try to rewrite history in such a way that they can move forward and leave a fund. The problem with the funds, as a trustee of one of the funds, is that we're finding the payment percentage going down and down as the number of filings are going up, up, up and up. And so, unfortunately, the landscape looks rather dismal with a confronting what I think is an excellent, excellent question. But I don't see Congress passing anything in the short run. As a result, we're just going to continue along the same lines, I think, in the near future.

MR. SCHWARTZ: Just to put some figures on something you said. For instance, in the beginning the Manville trust paid 100 cents on the dollar, then in the mid '90s, it went to 10 cents on the dollar; and now it's down to 5 cents on the dollar. So one of the things that—whether there is ever agreement when you have these meso[thelioma] cases, and there are a growing number of them, whether it is a good idea at this juncture to have money flowing into punitive damages or not is one where I just think it's not a good idea. Where there is a limited amount of assets and there are victims, it should go for compensation rather than some one or two people getting a very large punitive damages award. Again, if deterrence hasn't worked in asbestos, it's hard to see where it can work. So it's—I don't know what your thoughts are on that, but I'd be interested in knowing them.

MR. MCCORMICK: I think punitive damages do deter activity of people. There are—or corporations or whoever, individuals. I firmly believe that they should be part of the tort system. I do recognize that there are situations—probably asbestos at some point in time—whether we're there or whether not can be debated. But certainly you get to a point where there's no money; there is nothing there to deter. A corporation can only be deterred from doing wrongful acts, in my opinion, by affecting the balance sheet, and that's the great equalizer. Now, that's not to say that I don't think there should be some relation between the amount of damage suffered and the amount of punitive damages applied. That's a different issue. But to eradicate punitive damages to me would not be in the best interest of the average everyday person who is the bulk of the clients that I represent.

MR. SCHWARTZ: I think we are in agreement. I'm not talking about eradicating punitive damages in general. I would never sponsor that. I'm just saying in this particular litigation, deterrence has worked its course as a matter of public policy. And in other litigations where there's been no punitive damage award—let's assume that some companies have engaged in some new tort; they have done something very, very bad; punitive damages are appropriate with—it sounds like you are in agreement with some—some type of limitation so that you don't have a company going under from punishment before people who have not yet been compensated by their wrongful behavior have been paid, and that's a goal. And I've met a number of very prominent plaintiffs' lawyers who seem to be willing to discuss.

MR. MCCORMICK: In that regard, that's why I—I always wondered why defendants were so afraid of consolidations. In a lot of ways consolidations protect you from that. For example, what happened in Jackson County when we finally got to a multiplier, a very small multiplier, in the context of the common issues we tried the case. We had ten plaintiffs, six of which got verdicts against a number of different defendants, some of which got completely out. Then we were going to come back in and deal with the issue of medical damages and compensatory damages for the remaining people in that group. So there was a lot at risk for both the plaintiffs and the defendants there, and what I believe that I have seen in litigation as it's progressed in Mississippi since that time is, is that although there have been joinders and consolidations for discovery or whatever purposes, we never got to a common issues trial. There were ten individual cases tried or is—what? I believe in Holmes County only five cases were tried. I'm not sure that had any effect or maybe it did on remaining cases. But in a lot of the cases I have seen tried, there are just those individual cases. They get huge awards, and I'm not saying—I'm not debating whether they are or aren't deserving, but certainly then there is less money as we go along. Because AC&S, one of the defendants in Holmes County, I believe, only has $220 million in insurance left. And—what was it? $86 million is there, and there's another $100 million out in Texas. It's not just a Mississippi problem. They're everywhere.

MR. ANDRUS: David, I want to open it up and see if anybody has any additional questions.

QUESTION: The next question is for Victor Schwartz and Francis McGovern. In the exercise of the courts' cases that we talked about, what would be your views on the courts appointing their own experts in cases like this and other mass tort cases to sort out what is really reasonable here and would that have an impact in jury verdicts, for example?

MR. MCGOVERN: I mentioned to General Thornburgh after his talk—he referred in silicone gel breast implant cases to the National Academy of Sciences. The real difference in those cases where folks were alleging systemic harm from exposure to silicone from the implants—Judge Sam Pointer of Birmingham appointed a 706, panel, and that is under Federal Rule of Evidence 706, which allows the court to appoint neutral experts. And that was the panel report that really changed the complexion of the litigation. That's not to say Dow Corning wouldn't have been bankrupt anyway from the ruptures, leaving aside the ruptures and the disfigurement—just talking about the systemic diseases. It had, I think, a very salutory effect. I was involved in the appointment of that. I've served as a 706 expert myself, and I think it had a very useful role.

QUESTION: What do you think about defendants in those cases?

MR. MCGOVERN: In large part, and I've written a fair amount about it and thought about it a fair amount, the studies have suggested that the opposition from the bar is really the primary concern; that is to say, if you have a judge appoint a neutral expert, you're trying the case to one person, and as a result, the lawyers don't like that very much. It's a very risky situation. And anyone who thinks that experts are completely neutral has been living in another universe from mine. All experts have some type of bias. They may have no experience in something, but they have assumptions about issues like risk. Do you want to presume the risk is good, or do you want to presume the risk is bad? So it is dangerous.

On the other hand, if you can phrase the question in a really scientific way so that you don't necessarily engage in the *Daubert* type of analysis per se, if you just ask, is it generally accepted, you know, what is the error rate and so on down the line and then have the judge apply *Daubert*, it seems to me you can utilize these folks quite well. I would be surprised if we don't see a similar move in the context of the bankruptcies in Delaware.

MR. SCHWARTZ: I think it's—Professor McGovern has outlined the pitfalls—a court-appointed expert in general is going to have a little bit less bias than two gladiators who are meeting from either side. In 1905, John Wigmore, in his treatise, posed this wonderful question. He said, How can a jury of laypersons who by definition are not knowledgeable about science decide between two people who are steeped in the very science they know nothing about? And he just kind of left it there, and you turn the page. Well, that question still haunts us today. There is always the possibility that a judge who's a plaintiff-oriented judge will select as a "neutral" expert one who isn't, and a judge who is a defense-oriented person could do the opposite. But comparing that from the two gladiator approach, it may be better.

MR. MCGOVERN: Just pushing the point—let me just push a little bit. In Europe they do it all the time, all the time. In fact, Paul Carrington—as David knows—Paul Carrington at Duke has put together a registry of neutral experts to make it easier for judges to be able to do. So I see some movements along that line.

QUESTION: This question is for David McCormick. In asbestos cases what behavior is left to deter?

MR. MCCORMICK: Well, there are still some companies that continue to utilize asbestos in their products, and there is a dispute out there as to whether or not they should or should not be. So from that perspective that there is a deterrent and to them trying to make a decision whether they want to continue to use asbestos in their products.

QUESTION: Are any of those companies your defendants?

MR. MCCORMICK: Yes.

MR. TARDY: Let me respond for a minute there. The use of asbestos in the United States is practically nonexistent today. The outside shell of the space shuttle I think has asbestos in it, and there are some military uses that the government says that the only thing that can do the job is asbestos. It's used there. I don't know how you could possibly blame the manufacturers of the products if anything goes wrong in those types of uses, so I disagree with David. If there's anybody out there today you can aid, you need to deter. And secondly, given the funding situation, why not use the available funds that are left to compensate—everybody in this asbestos business would like to see injured, exposed people compensated by those persons who were responsible for the products to which they were exposed. To the extent they are still around, they've got limited funds. It certainly makes a lot of sense to me to use those funds to compensate for actual injuries as opposed to punish at this point.

MR. SCHWARTZ: It's on the space shuttle? No. I've just seen the future. My friends on the plaintiffs' bar soliciting on other planets.

QUESTION: Sir, I guess to speak to you. This has been going on thirty years maybe a discovery rule or maybe both, (Inaudible) but we all know about asbestos. Why is the statute of limitations available at least on some of these cases?

MR. TARDY: The statute does not begin to run until a plaintiff either knew or reasonably should have known that he was injured, not that he was exposed. The one thing we forgot to cover is there is something called a latency period. It's not like you take five aspirin today and get sick. You actually have a period—it's a minimum of almost fifteen years before you know that the scarring in the lung becomes sufficient enough to actually impair you at all. The lung has such a wonderful capacity to function that you really have to do it a lot of damage before you get an objective symptom such as the Pearson—the black and white x-ray or really shortness of breath.

MR. MCCORMICK: It's in the discovery rules and the case came out of Jackson, County, Mississippi. It's *Owens Illinois v. Edwards*, and that sets forth why there's those issues.

MR. ANDRUS: I think that just about does it. Do you want to wrap this up now? We're right on time. Thanks everyone for everything.

PUNITIVE DAMAGES: HOW AND HOW MUCH?

Panelists
John V. Reistrup, Moderator
The Hon. William Bradford Reynolds
The Hon. Reuben V. Anderson
Grady F. Tollison, Jr.
The Hon. Betty W. Sanders

MR. HEWINS: Okay. Next is the punitive damages panel, it will be moderated by John Reistrup. Mr. Reistrup is the founder of *Liability & Insurance Week.* And if you look when you take your next break, he has left copies of his newsletter outside. So be sure to take a look at that. That newspaper covers both liability and insurance issues at the national and state levels. He has held high-level editorial positions for a number of newspapers including *the Washington Post, the Toronto Star,* the *New York Post, the Calgary Albertan* and the *Seattle Post-Intelligencer*. John Reistrup.

MR. REISTRUP: Thank you. I want to add my appreciation to Charles and the other organizers of this. I've been covering the tort wars for fifteen years, and I have not seen a more impressive series of panels and speakers. I'm not a lawyer, and I'm in the newsletter business in the Metropolitan Washington, D.C. area, but I do have a couple of observations. One is on juries. We've heard something about juries earlier, and the other is on punitives. I happen to be in the newsletter business. We mail. We receive mail and we send mail, and I happened to be in the mailroom a couple of weeks ago, and the mailroom was served by the Brentwood Post Office which is where the Anthrax letter went through to the Hart Office Building in Washington. The people working in the mailroom were wearing masks and gloves. The postman came in, and he noted that they evacuated the Hart Building; everybody out of it. And all the members of the House went home, but all the people at Brentwood were still working, and he was still working and they were not testing. Since then, two postal workers have died. This touches on something that I think is an undercurrent. When we talk about juries—runaway juries, that is the magic word that we never use in this country is class. There are class distinctions in this country. There's no answer to that postal worker; he was absolutely right. And that's something that we've got to keep in mind when we talk about the jury system. That's my personal opinion.

It's also ironic because we inherited the jury system from England, which is a way worse class system than ours. The other observation is on punitive damages, which Mr. Reynolds will go into in more detail. But it's notable that punitives have been left to the states for more than two centuries, and the United States Supreme Court only got dragged into it reluctantly when they finally decided that punitive damages could be so disproportionate to compensatory damages in economic cases as to violate due process of law. So that has set the outer parameters of the punitive damages debate that is going on in the states.

Now, for our first speaker, I'd like to introduce Mr. William Bradford Reynolds who is a litigation partner with Howrey Simon Arnold and White, in Washington. He's a graduate of Phillips Academy, Yale and the Vanderbilt School of Law. He was Assistant to the Solicitor General, Irwin Grizwald and then was Assistant Attorney General for Civil Rights under President Reagan. He's an experienced appellate litigator, admitted to the bar in most federal circuits and to the United States Supreme Court where he successfully argued the most recent case involving punitive damages, *Cooper Industries and Leatherman Tool Groups*. That happened to be one of the business-to-business cases that we're talking about. It was an intellectual property case. Mr. Reynolds.

PUNITIVE DAMAGES AWARDS AFTER *COOPER INDUSTRIES v. LEATHERMAN TOOL GROUP*

William Bradford Reynolds

One thing on which we can all agree is that punitive damages jurisprudence has seen some seismic shifts in recent years. The Supreme Court's decision last term in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[1] continued what can only be viewed as a judicial "circling of the wagons" around extraordinarily high punitive awards, so as to ensure that the punishment meted out for a defendant's misconduct retains some semblance of rationality in its fulfillment of the overreaching punitive and deterrence purposes.

As you all know, *BMW of North America, Inc. v. Gore*[2] provided the break-point that the Supreme Court had signaled was coming in *Pacific Mutual Life Insurance Co. v. Haslip*[3] and *TXO Production Corp. v. Alliance Resources Corp.*[4] By holding that a punitive award, if so excessive as to lack a rational relationship to the severity of the proven offense, oversteps the bounds of constitutionality, the Court made it clear in *BMW* that large awards of punitive damages must be subjected to some degree of judicial oversight.[5] In particular, *BMW* established a number of objective criteria, all of which entail inquiries outside the purview of the jury, to assess the constitutional legitimacy of the punitive award.[6] These include: (1) the reprehensibility of the conduct, (2) the proportionality of the punitive award in comparison to compensatory damages and (3) other examples of punishment for the same or similar conduct.[7]

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[1] 532 U.S. 424 (2001).
[2] 517 U.S. 559 (1996).
[3] 499 U.S. 1 (1991).
[4] 509 U.S. 443 (1993).
[5] *BMW*, 517 U.S. at 568.
[6] *Id.* at 574-75.

In *Cooper Industries*, the Court considered whether appellate courts reviewing constitutional challenges to punitive damage awards must apply these "guideposts" independently or, instead, consider them in a more relaxed manner with deference (indeed, considerable deference) accorded to the jury's dollar figure and the district judge's affirmance thereof.[8]

Cooper Industries involved a federal lawsuit in which Leatherman Tool Group, a manufacturer of multi-purpose hand tools, asserted claims of trade dress infringement, false advertising and unfair competition under both federal and Oregon state law against its competitor, Cooper Industries.[9] Cooper had essentially copied its new product, The ToolZall, from Leatherman's Pocket Survival Tool (PST), and then used slightly mocked-up pictures of the PST in the initial ToolZall advertising materials.[10] Finding liability on all counts, the jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages.[11]

On appeal, the Ninth Circuit reversed the finding of liability on the trade dress infringement count, concluding that, because the design of the Leatherman PST was overwhelmingly functional, there could be no trade dress protection against a competitor developing a similar "copycat" device.[12] With respect to the false advertising and unfair competition counts, however, the appeals court affirmed the damage awards and specifically concluded that the $4.5 million punitive award was constitutionally acceptable.[13]

The sole issue before the Supreme Court concerned the standard of review to be applied by federal courts in reviewing a constitutional challenge to a punitive damage award.[14] The Court decided, by an 8-1 margin, that de novo review was required, meaning that reviewing courts may no longer defer to the jury or trial judge when confronted with a constitutional "excessiveness" challenge, but must *independently* assess the size of the punitive award in light of the *BMW* guideposts identified above.[15] This inquiry is, as the Supreme Court recognized, essentially legal in nature and not a central part of the jury's "fact finding" process.[16]

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[7] *Id.*

[8] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 430-31 (2001).

[9] *Cooper Indus.*, 532 U.S. at 428.

[10] *Id.* at 427-48.

[11] *Id.* at 429.

[12] *Id.* at 429-30.

[13] *Id.* at 430.

Clearly, this more diligent standard of review provides yet a further judicial check on the disproportionately large punitive awards increasingly handed down by runaway juries, which are too often overcharged with emotion and wrongly swayed by the size and financial capacity of the defendant. This is not to say that the *Cooper Industries* decision took consideration of company size and financial wherewithal "off the table." To the contrary, that variable retains some relevance and can be accorded some weight by the reviewing court on de novo review, at least to the extent that it is the subject of record evidence. But the defendant's wealth cannot subordinate the other *BMW* guideposts, nor can it function as a "tide-turning" feature of the analysis. In other words, if the *BMW* assessment of reprehensibility, proportionality and comparability leads to an "excessiveness" determination, it is highly unlikely that company size and wealth can be used to nonetheless sustain the award's constitutionality.

Two questions have been raised since the *Cooper Industries* decision bearing on its reach and likely impact.

The first—what application does this opinion have to state court proceedings—has already received some judicial attention. Three constitutional challenges to punitive awards arising out of state court proceedings have been turned aside by the Supreme Court under orders granting certiorari and remanding for further consideration in light of *Cooper Industries*.[17] Since these cases each involved a challenge under the

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[14] *Id.* at 431.

[15] *Id.* at 442-44.

[16] *Id.* at 435-37.

[17] *See* Nat'l Union Fire Ins. Co. v. Textron Fin. Corp., 122 S. Ct. 340 (2001)

United States Constitution, it is not at all remarkable for the Court to underscore that both federal *and state* courts will be held to the same de novo standard of review on excessiveness challenges brought under the federal Constitution. Even where only state law is implicated—in other words, where the argument is that the punitive award is "overly excessive" merely as a matter of state law, not substantive due process under the Fourteenth Amendment—the state court's inquiry is still a predominately legal, policy-laden evaluation, and the same rationale that counseled in favor of de novo review in federal constitutional challenges should logically apply with equal force to the state law excessiveness issue. Indeed, the early returns from state courts having addressed this point seem to embrace the more exacting standard of review required by *Cooper Industries*, if not because *Cooper Industries* demands such a result, then because prudence and jurisprudence certainly recommend it.[18] My prediction—and it is just that, a prediction—is that all "excessiveness" challenges to punitive damages awards, in both federal and state courts, and whether implicating the United States Constitution or only state law limits, will in short order be scrutinized under a de novo standard.

The second question that *Cooper Industries* raises, at least according to the Association of Trial Lawyers of America, is whether the Supreme Court's affirmation that punitive awards do *not* implicate the jury's "fact finding" responsibility—and therefore, are not subject to the constraints that the Seventh Amendment's Reexamination Clause places on appellate review of jury "fact" determinations—allows reviewing courts to *increase* punitive damages (i.e., additur) as freely as they can decrease them (i.e., remittitur).[19]

(mem.), *vacating* Textron Fin. Corp. v. Nat'l Union Fire Ins. Co., No. G020323, 2001 WL 1201631 (Cal. Ct. App. Jan. 29, 2001); Time Warner Entm't Co. v. Six Flags Over Ga., LLC, 122 S. Ct. 24 (2001) (mem.), *vacating* Time Warner Entm't Co. v. Six Flags Over Ga., LLC, 537 S.E.2d 397 (Ga. Ct. App. July 13, 2000); San Paolo U.S. Holding Co. v. Simon, 121 S. Ct. 2190 (2001) (mem.).

[18] *E.g.*, Acceptance Ins. Co. v. Brown, No. 1991938, 1992026, 2001 WL 729283 (Ala. June 29, 2001).

[19] *See* Robert S. Peck, *Winning Increased Punitive Awards After* Cooper, TRIAL

Although criticized in some quarters, the Supreme Court in *Cooper Industries* had both the common law and historical precedent on its side in concluding that juries are acting as the moral compass of the community, not as evidentiary "fact finders," when they turn to the question of an appropriate monetary penalty to punish the defendant and deter repetition of wrongful conduct.[20] As Justice Scalia observed in his dissent in *Gasperini v. Center for Humanities, Inc.*,[21] and the *Cooper Industries* Court embraced, the calculation of a punitive award is not a "fact" that is "tried to the jury."[22] Thus, the Seventh Amendment protection of the jury's "fact finding" process does not preclude appellate courts from independently assessing whether the jury's punitive award exceeds constitutional limits.[23]

But does this open the door to court-ordered additurs in response to the argument that a punitive damage award is too low? It strikes me that this is a hard argument to make. The Supreme Court was clear that de novo review of a punitive award under the *BMW* guideposts has application where the amount awarded is so large as to implicate substantive due process concerns.[24] Short of that, i.e., where the punitive damages are within constitutional limits, the jury's moral judgment (as proxy for the community) is fully entitled to deference. That would presumably always pertain in the context of a challenge that alleges that the punitive damages are "too low."

It is one thing to assign appellate courts the responsibility of determining—independently and on the basis of a set of objective legal criteria—whether a particular punitive award exceeds the maximum amount that is constitutionally allowable. It is quite another to give appellate courts wholesale license simply to substitute their judgment for that of the jury

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(Oct. 2001), at 51.

[20] *See Cooper Indus.*, 532 U.S. at 432-36.

[21] 518 U.S. 415, 459 (1996).

[22] *Cooper Indus.*, 532 U.S. at 437; *Gasperini*, 518 U.S. at 45 (Scalia, J., dissenting).

[23] *See Cooper Indus.*, 532 U.S. at 437.

[24] *Id.* at 435

in meting out appropriate punishment. *Cooper Industries* concerned the former proposition.[25] It said nothing to suggest any sort of endorsement of the latter.

Indeed, the law on adjustments of punitive awards where no "constitutional excessiveness" issue is involved seems well settled. Remittiturs have been upheld as a proper exercise of judicial authority, but only where the plaintiff is afforded the opportunity to resubmit the issue of punitive damages to another jury in lieu of accepting the *lower* award.[26] Additurs, on the other hand, have long been prohibited, as the Supreme Court made unmistakably clear in *Dimick v. Schiedt*.[27] As we all know, the Court there reaffirmed the well-established practice and rule at common law forbidding court-ordered increases in damage awards.[28] Given the Court's particularly strong fidelity to *stare decisis* in that decision,[29] it is unlikely that the Court intended its *Cooper Industries* decision to overrule the *Dimick* case *sub silentio*.

Furthermore, it is hard to imagine that judicial additurs would ever be recognized without, at the very least, affording tort defendants the same opportunity given to plaintiffs when confronting a non-constitutional remittitur, i.e., the opportunity to "opt-out" and have the punitive damage issue submitted to another jury for reconsideration.[30] Not only am I aware of no precedent for such a jurisprudential scheme, but I doubt that the plaintiffs' bar would look too kindly on giving defendants the option of having a second bite at defending against the punitive damages apple. Certainly, no part of *Cooper Industries* suggests that the Court is thinking along such lines or is of a mind to open the floodgates on punitive damage additurs.

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[25] *Id.* at 443.

[26] *See* Hetzel v. Prince William County, Va., 523 U.S. 208, 211-12 (1998) (per curiam) (finding Court of Appeals' writ of mandamus to require lower court to enter judgment for lesser amount than jury awarded unconstitutional).

[27] 293 U.S. 474 (1935).

[28] *Dimick*, 239 U.S. at 487-88.

[29] *Id.* at 482-88.

[30] It has never been seriously suggested that there is any *federal constitutional* right to a punitive damage additur.

I would, therefore, offer the observation that, where that leaves things, at least for the present, is probably on fairly sound footing. Punitive awards, if reasonable in amount, will likely remain undisturbed. Courts will continue, on occasion, to grant remittiturs where appropriate but will decline the invitation to grant requests for additurs—leaving to juries the judgment call on what should be the maximum punishment, so long as that judgment call is within constitutional limits. Furthermore, my expectation is that the more exacting review standard laid down in *Cooper Industries* will lead initially to a number of constitutional challenges, but that, over time, the parameters of such awards will become clearer and the constitutional challenges fewer.

What we will likely see is more careful attention to the evidentiary case at trial. The Court made clear in *Cooper Industries* that the *BMW* "reprehensibility" factor was dependent in part on the factual trial record, and that as to the fact findings made to describe the defendant's conduct, deference was appropriate on review. On a related note, as to the third *BMW* factor—i.e., other legislative or judicial sanctions for the conduct in question—we should anticipate more of an effort to make a record at trial in this area. The defendant's size and wealth may also be "fair game" from an evidentiary standpoint. All of this does not negate the need for independent de novo review on a constitutional challenge to a punitive award. Rather, it suggests that, in time, review will likely be more informed and better calculated to check jury excesses, which have largely gone unchecked under the more relaxed abuse of discretion standard.

MR. REISTRUP: Thank you, General. Our next speaker is the Honorable Reuben Anderson. He was the first African-American graduate of the University of Mississippi Law School and later became the first African-American Mississippi Supreme Court Justice. Along the way, as you can imagine, he saw some changes. He told me today that Judge Harold Cox used to assign him all his Indian cases because he disliked Indians even more than he disliked black people. And they wouldn't pay him. He has since then served, ironically enough, as Jamie L. Whitten Chair of Law and Government at the University of Mississippi. And after retiring from the bench, he joined the law firm of Phelps Dunbar in Jackson and serves as President of the Mississippi Economic Council or State Chamber. Judge Anderson.

WHY MISSISSIPPI NEEDS TO PAY ATTENTION TO NATIONAL TRENDS ON PUNITIVE DAMAGES

Reuben V. Anderson

Companies today can invest money and hire people in just about any state they find suitable: Mississippi, Oklahoma, Alaska or Maine. At the same time, Mississippi has become increasingly dependent on national corporate support. To realize how profound the change has been, one needs only to list some of the names of companies started by Jackson families who are now owned by national or regional corporations: McRae's, the *Clarion-Ledger*, Jitney Jungle and so on.

As a member of the board of directors of several national corporations, I can tell you that companies care about the legal climate of the states in which they invest. For that reason, it is essential that Mississippi keep up with legal trends around the country and try not to get too far out of step.

Nowhere is this need more apparent than in the area of punitive damages. Because of Mississippi's loose standards for determining the amount of punitive damages, Mississippi punitive damages doctrines have bankrupted one national corporation, almost caused the bankruptcy of another and, today, threaten to bankrupt many more. The punitive damages awards are unpredictable and grossly out of proportion to the offenses they have caused. Punitive damage awards have caused great concern in the American corporate community. In fact, within the past year, our firm has been called on to give advice to one of the largest finance companies and one of the largest insurers in the United States, who asked whether they should attempt to withdraw from Mississippi entirely. We have no reason to believe that these inquiries are anything other than dead serious.

Nationally, the United States Supreme Court has tried to reign in punitive damages by requiring that appellate judges review, as a matter of law, each punitive damages award for excessiveness, using a three-part formula: i) reprehensibility of the wrong, ii) ratio of punitive damages to actual damages and iii) notice given by statutes which punish similar offenses.[1]

In Mississippi, our supreme court has taken a step forward by amending Rule 8 of the Mississippi Rules of Appellate Procedure in a fashion that is designed to make punitive damages appeals more readily available to litigants.[2] In order to appeal a punitive damages award, a defendant would not necessarily have to post a bond for the full amount.[3] There is a cap on the amount of the bond, which is 10% of the defendant's net worth,[4] or $100 million,[5] whichever is less. This was a good step for the court to take, but the court's very choice of the figure $100 million is a cause for concern because it suggests that the court contemplates punitive damages that are vastly greater than the amounts typically awarded around the country.

The real "bite" of the United States Supreme Court's test is its requirement that the ratio of punitive damages to compensatory damages be reasonable.[6] Until recently, our state supreme court has been generally unwilling to enforce this rule. There seems to be an assumption that the ratio does not count if the defendant corporation has a high net worth. There is nothing, however, in the constitutional test that says you get more punitive damages against a company with a higher net worth. And surely net worth, a state factor, cannot be used to override the federal constitutional standards in *BMW*.[7]

To take a few examples, in *Paracelsus Health Care Corp. v. Willard*,[8] an employee suffered $10,000 in actual damages after he was fired because he reported suspected—not proved—criminal conduct by his supervisors.[9] The Mississippi Supreme Court affirmed a punitive damages award of $1.5 million, a ratio of 150 to 1.[10] The opinion contained no comparisons to ratios in other states, or indeed in other Mississippi Supreme Court opinions.

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[1] BMW of N. Am. v. Gore 517 U.S. 559, 574-75 (1996); *see also* Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 435 (2001) (quoting three-part test from *Gore*).

[2] MISS. R. APP. P 8(a).

[3] MISS. R. APP. P 8(b)(1).

[4] MISS. R. APP. P 8(b)(2)(b).

[5] MISS. R. APP. P 8(b)(2)(c).

[6] *BMW*, 517 U.S. at 580.

[7] *Id.* at 574-75.

[8] 97-CA-01494-SCT, 754 So. 2d 437 (Miss. 1999).

In *State Farm Mutual Auto Insurance Co. v. Grimes*,[11] the supreme court, in an insurance bad faith case—ironically premised this time on the theory that a *company* had made an unprovable accusation of criminal conduct—affirmed a punitive damages award of $1.2 million on an actual damages award of $1900, a ratio of 658 to 1.[12] Again, no comparison was made.

Prior to a more recent decision discussed below, the closest hint the court had given that it might find an award excessive was in *General Motors Acceptance Corp. v. Baymon*.[13] The court commented that where the actual damages proved were $762, a verdict for $35,000 in compensatory damages and $5 million in punitive damages was excessive.[14] There, the punitive damages awarded were 142 times the jury's compensatory award and approximately 6000 times the damages actually proved by the plaintiff.

There are many good lawyers in this room. No doubt each and every one of them could point to some fact or circumstance which could be said to justify high awards in each of these cases. But what is important for us to realize is that both *Paracelsus* and *Grimes* presented ratios that are in the top 5% of all awards nationally and so merited much closer scrutiny than the court gave them.

In 1999, a study was done of cases reported in Westlaw and elsewhere for a three-year period to determine the ratios of punitive damages to compensatory damages found in reported cases.[15] The Westlaw study involved 251 published opinions.[16] A state trial court study, used for comparison, looked at 173 cases.[17] The authors came up with a simple formula to determine when an award is in the top 5% of all awards in the country in terms of the ratio of punitive damages to compensatory damages. Their formula was this: $500,000 or ten times compensatory damages, whichever is greater.[18]

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[9] *Paracelsus*, 97-CA-01494-SCT, ¶ 2, 754 So. 2d at 439.

[10] *Id.* ¶¶ 38-40, 754 So. 2d at 445.

[11] 95-CA-00918-SCT, 722 So. 2d 637 (Miss. 1998).

[12] *Grimes*, 95 CA-00918-SCT, ¶ 7, 722 So. 2d at 639.

[13] 97-CA-01361-SCT, 732 So. 2d 262 (Miss. 1999).

[14] *Baymon*, 97 CA-01361-SCT, ¶ 68, 732 So. 2d at 275.

When they applied this formula to national punitive damages awards, 95% of all the awards fell below this standard and only 5% exceeded it.[19] They also found that appellate courts, who of course had no idea of this standard when they issued their rulings, reversed a solid majority of the awards in the top 5%.[20]

Each of the amounts affirmed by the Mississippi Supreme Court mentioned above is in the top five percent in the country governed by this standard. In both *Paracelsus* and *State Farm*, the judgment would have been at the top of the top 95% if the punitives had been remitted to $500,000 from $1.5 million and $1.2 million respectively.

The point is not necessarily to say these decisions are wrong but to publicize the fact that some Mississippi decisions are significantly out of line with the trend in decisions elsewhere.

Recently, the Mississippi Supreme Court's decisions on punitive damages have been more in line with the national standards. For example, in *Cooper Tire and Rubber Company v. Tuckier*,[21] the court discussed the ratio requirement of *BMW* when affirming a $3 million punitive damages award which it stated "was nearly ten times the compensatory damages award" of $329,000.[22] This ratio, of course, is still at the highest end of the national standard, and we have no way of knowing whether the court would have affirmed an even higher award had the jury entered one. Unfortunately, the court's discussion in this case also links the ratio requirement to the defendant's net worth. The court found the ratio of 10 to 1 to be acceptable because under Mississippi's punitive damage statute,[23] the defendant's financial condition and net worth are factors to be considered.[24] In affirming the punitive damages award in that case, the court noted that it represented "less than one percent of Cooper's net worth."[25]

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[15] Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, The Impact of* BMW v. Gore *on Punitive Damage Awards, and Forecasting Which Punitive Damage Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59 (1999).

[16] *Id.* at 65.

[17] *Id.*

[18] *Id.* at 62.

[19] *Id.* at 79-84.

[20] *Id.*

[21] No. 2000-CA-00404-SCT, 2002 WL 24605, at *1 (Miss. Jan. 10, 2002), *petition for cert. filed*, 70 U.S.L.W. 3758 (U.S. May 30, 2002) (No. 01-1761).

The most thorough discussion of the *BMW* factors to date by the Mississippi Supreme Court is in the recent decision of *MIC Life Insurance Co. v. Hicks.*[26] In granting the petition for rehearing filed in that case, the court addressed the argument that the punitive damages awarded against MIC Life were excessive. The jury had awarded $6 million against MIC Life which had been reduced by the trial court to $1 million.[27] The actual damages at issue in this case were $637.99.[28] The supreme court found that even $1 million was "grossly excessive."[29] In discussing the ratio of compensatory damages to punitive damages, the court noted that the ratio in this case was 1567:1—an amount that "absolutely boggles the mind."[30] The court stated that the highest ratio previously sanctioned by the court was one of 600:1 in

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[22] *Cooper Tire*, 2000-CA-00404-SCT, ¶ 48, 2002 WL 24605, at *10.

[23] MISS. CODE ANN. § 11-1-65(1)(f) (Rev. 2002).

[24] *Cooper Tire*, 2000-CA-00404-SCT, ¶ 48, 2002 WL 24605, at *10.

[25] *Id.* ¶ 51, 2000 WL 24605, at *11.

[26] 1998-CT-01217-SCT, 2002 WL 1722168, at *1 (Miss. July 25, 2002).

[27] *MIC Life Ins. Co.*, 1998-CT-01217-SCT, ¶ 2, 2002 WL 1722168, at *5. The jury had also awarded punitive damages in the amount of $30 million against another defendant, General Motors Acceptance Corporation, which had been reduced by the trial court to $6 million. Because the case was remanded for a new trial as to that defendant, the court did not discuss the amount of damages awarded against it. *Id.* ¶¶ 2, 10, 11 and 31, 2002 WL 1722168, at *1, *3 and *8.

[28] *Id.* ¶ 7, WL 2002 WL 1722168, at *2.

[29] *Id.* ¶ 17, 2002 WL 1722168, at *5.

[30] *Id.* ¶ 19, 2002 WL 1722168, at *5.

Independent Life & Accident Insurance Co. v. Peavy.[31] Rather than remitting the award, the court remanded the case for a new trial on the amount of punitive damages awarded against MIC Life.[32]

Although these later decisions are an encouraging sign that the Mississippi Supreme Court is bringing punitive damages award in this state more in line with national trends, they by no means guarantee that future punitive awards will not be outside the standards discussed above. Mississippi, however, cannot afford to be completely out of step with other jurisdictions on this issue, and it is hoped that the court will continue to apply the *BMW* guidelines to hold punitive damages awards within reason.

Mississippians, of course, have been long known for defying the rest of the nation. The slogan that was used in the recent judicial races, "Don't Mess With Mississippi," reads very much like a sign that might have been put up at a segregationist rally in the 1960s.

But ultimately, cooler heads must prevail now as they did then. We profit greatly from being part of a national economy. This state simply cannot expect to thumb its nose at national enterprise in the courtroom, while reaching out to shake its hand in the customer line.

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[31] *Id.* (*citing* Independent Life & Ins. Co. v. Peavy, 528 So. 2d 1112 (Miss. 1988)).

[32] *MIC Life*, 1998-CT-01217-SCT, ¶ 31, 2002 WL 1722168, at *8.

MR. REISTRUP: Thank you, Judge. Our next speaker is Grady F. Tollison, Jr. He was born in the Dry Creek Community in Tippah County, Mississippi. And he's the first lawyer in his family, but he is not the last. He practices law with his wife and his son and I believe his daughter-in-law until she went off to teach law, and she's teaching torts. He was Editor-in-Chief of the Mississippi Law Journal and had the highest grade point average in his class at the School of Law here. He has been president of the Mississippi Bar Association, and he's been active in the Mississippi Trial Lawyers Association. He was commended by the State Supreme Court for helping to promote passage of court reform legislation. That's C-O-U-R-T, not tort. He's tried more than a hundred cases to juries. And Mr. Tollison.

MR. TOLLISON: Thank you, John. I think I was sitting here—I looked at the program, and I wondered why I was here. I was kind of hoping John wouldn't mention that he wasn't a lawyer because once he mentioned he wasn't a lawyer that made me the only "non-honorable" lawyer on this panel. If you'll notice everybody's "honorable" but me, and I was wondering what that—where that kind of puts me. I should have mentioned, I was City Judge in Clarksdale in 1973; that may give me some kind of recognition, I don't know.

Maybe the reason I'm here is I'm a plaintiff's—sometimes a plaintiff's—lawyer who has actually lost cases, and I've also failed to get punitive instructions in cases that I thought I should have had punitive instructions. I've gotten punitive instructions and haven't gotten them. So maybe there's a balance here that we're forgetting. And I want to express a concern that both Scotty and Reuben mentioned what I'm hearing here today and what I'm reading a lot about in the papers—and that is attacks on two things that make this profession one that I wanted to go into and one that I'm still proud to be into. I say that all the time, that I actually like practicing law, and I have lawyers look at me like I've lost my mind. I've been doing it about thirty years, and I like going to work every day. I like going to try lawsuits, most of the time. And I like the adversarial system, and I like the Seventh

Amendment. What I've heard here today—a lot of what I've heard here today—are attacks on the Seventh Amendment, the jury system and the adversarial system. I won't get into what was talked about on our rule on experts in federal court, which was mentioned earlier by one of the panelists, and I understand. I wouldn't use one of those experts for loss of enjoyment of life either. I think it's bad tactics. But what I've always found out is the good lawyers I've run into on the other side take care of bad experts. I was sitting here today listening to Mr.—I'm going to call him "Crouching Tiger." I have a sense of who I would hate to have as an adversary. That gentleman this morning whose nickname is "Tiger"—I don't think he's still here—I would hate—I want him to stay out of Mississippi because I don't want to try lawsuits against him. He has a presentation and a presence and that's what really solves most of these problems.

I disagree with Reuben in the sense that we've got some problems here. We may have some problems, but I don't think they're keeping businesses out of here at all, and I hate to use an incident—I do occasionally represent the other side. This morning I had a call from a bank that I represent—I won't tell you it was one locally because you might quit putting your money in it. It's another one down in another part of the state. And the call was that they're changing insurance. And they said the insurance—one of the reasons is, it's one of those directors and officers insurance that never provides any coverage— you know those kind. They just absolutely refuse to provide coverage; they just want the premiums. And they're changing. They said we're getting a lot of pressure from our own carrier to do it. And I know that's not—that's one instance, but I know a lot of insurance companies that want to write business here every day. And I hear, with deference to someone who made the comment—well, David, I'll back you up on this, and I want to be corrected. I hear about punitive damages and healthcare providers. Please correct me and tell me the cite of a reported decision in Mississippi that has ever awarded punitive damages to a healthcare provider. Ever in the history, in the history of this state, please cite me one case reported by an appellate court that awarded punitive damages to a healthcare provider. Ever.

Now, I've settled a few where the guy was drunk in the operating room, and they paid a little premium and that didn't get reported because it didn't get tried. But where is that problem? And I heard someone mention eleven and one jury verdicts for healthcare providers. They've lost one out of eleven, and that was reversed on appeal; I believe that was the statistic last year. It was thirty-six and the one that was won—it was thirty-six wins, one loss two years ago. And the one that was lost, they had offered $60,000 and the plaintiff only got $20,000. So I know we have these problems.

Let me address something—and by the way, Jim Chandler, you said something about advertising, and I don't have any problems with my brothers and sisters who advertise; I just don't happen to do it. The way it came out was that I was running ads. I'd like to correct that. That was the bar who was running ads while I was president about lawyers, but it's certainly all right. I believe in the First Amendment. But we have a judge that's retiring this year in this circuit here in Oxford named Ken Coleman. He was a district attorney, then he was a judge. And he used to say something that fortunately he doesn't have to say very much anymore. When we were doing a voir dire, and someone would raise their hand and it was—years ago it was inevitable—maybe two or three people that could not read and write. And they would be very embarrassed, as you might imagine, to have to stand up publicly and say, "I can't read nor write." And what Judge Coleman would say, and I know he may not have thought of this, but I always thought it was so important. He said, "Don't you be embarrassed. We should be embarrassed. That's our fault, not yours." And when I hear this, and I'm glad to hear about the educational level of Jefferson County, but if there's some problem, if there's some that respond emotionally, then maybe that's where the Mississippi Economic Council ought to be working. Let's do something about the education of our potential venire. Let's don't criticize the jury system. Trust me when I tell you to go try a case in Desoto County and see if you get a hundred million dollar verdict; I don't care if you've got two hundred million dollars in actual damages. Go try one in Lee County and see how you do. Go try one in—and by the way for you out-of-towners, it's Lafayette; if you want to act like a native tonight going out to eat, it's Lafayette County where we are here. Go try one here. Big breaks here are 50,000 and a hundred thousand. And I have to tell you, when I hear about this-having had some experience with the Fifth Circuit, the juries may giveth, but the Fifth Circuit taketh away. Trust me on that. You can trust me on it.

I want to—before I make a few comments, and I have prepared a paper, along with my law partner—she's out here today, Beverly Buskirk. We prepared a paper of the last ten years of punitive damages cases in Mississippi. The *Law Journal* has it, or you can write us, and we'll send you a copy. And it's got a little blurb on it that has to do with two things—mostly two things that have been a lot of talk in our Supreme Court: Ratios of actuals to punitives and also percentages of wealth. How they worked out. And so we've kind of analyzed those, if you'd like to get a copy of that.

Mississippi has not been too concerned about that. The Mississippi Supreme Court, even when [Judge] Reuben [Anderson] was on the Supreme Court, looked to conduct as the key criteria. A question up there about the asbestos industry a while ago was who is it deterring—the asbestos—but the second prong of that is what about others? When people go out and kill people and they look at this—let me tell you corporate boardrooms now look at these things and say, "Look what happened to the asbestos industry. Look what happened to them." And just a couple of examples on ratios, *Fred's Dollar Store v. M&H Drugs*, a Mississippi Supreme Court case, there were $650 in actual damages and $300,000 in punitive damages. I believe that's 500 to 1, sort of. That's close enough for me. But the conduct was pretty bad. They stole a customer list—stole, as in thief—and they thought that was pretty bad, and they thought the award was right. There's another factor to that case. There was actually $70,000 in actual damages, but the Supreme Court took that away and left the $650. So, our court has been looking at a number of things but primarily conduct. And how else can we deter that conduct except by punitive damages? We have a facility in our office where we put up little quotes, and I put this one up to remind myself. Lord Cook told us, in, I think, the *Sutton Hospital* case—I think that was the name of it—that a corporation cannot be convicted of treason and cannot be outlawed, and it cannot be excommunicated because it has no soul. And I think we need to remind ourselves how to get a corporation's attention.

The other thing that common law teaches us is that when two or three people gather together, they may can top an evil greater than the sum of two separately. That gives us the Laws of Conspiracy. So if board members meet and say, "How can we make more money with cigarettes?" (And I am not a tobacco lawyer or an asbestos lawyer, unfortunately. I made a bad career decision somewhere along the line.) But if we have board members who are members of public corporations, whose sole purpose is to make money, that's a for-profit corporation, they better try to do that, that's what the shareholders expect. Another way of saying that is I hear about greedy plaintiff's lawyers; corporations are there to make money. Then how can you control them? You can't. As Lord Cook also explained, the reason we hang felons is to keep them from doing bad things. And we take away their inheritance. We go down to the second generation of children. You can't hang a corporation. You can't hang anybody anymore, but you can't do anything to a corporation except punitive damages. And I would like to see more decisions, some of which our court has done, about conduct.

I do feel this—and I have never met a lawyer who has tried any number of, say twenty to twenty-five jury cases, plaintiff lawyer or defense lawyer, who doesn't walk away believing in the jury system. I've never met one. I'm anxious to meet somebody who has done twenty to twenty-five jury trials and doesn't believe in the jury system. And let me say this, in a point, I feel very passionate about this, obviously, about the Seventh Amendment, about our adversarial proceeding. My goodness, I've been—if y'all need some more lawyers somewhere that are getting hit, let me tell you, I'll give you a list of some I'd like to move away. I'll stop with that. Thank you.

SYMPOSIUM ON PUNITIVE DAMAGES

Abstract By:
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I. State Law: Mississippi Code Annotated § 11-1-65
   A. In any action in which punitive damages are sought:
      1. Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.
      2. In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.
      3. If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.
      4. The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.
      5. In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and

reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

6. (i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.
   (ii) In determining whether the award is excessive, the court shall take into consideration the following factors:
      a. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;
      b. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
      c. The financial condition and net worth of the defendant; and
      d. In mitigation, the imposition of criminal

sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

7. The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which caused the harm for which recovery of damages is sought.

B. The provisions of Section 11-1-65 shall not apply to:
   1. Contracts;
   2. Libel and slander; or
   3. Causes of action for persons and property arising out of asbestos.

II. United States Constitutional Issues
   A. 8th Amendment – "Excessive bail shall not be required, ***nor excessive fines imposed*** ..."
   B. 14th Amendment – "... nor shall any state deprive any person of life,liberty, or property, ***without due process of law*** ..."
   C. *BMW of North America v. Gore*, 517 U.S. 559, (1996) – Punitive damages award of $2,000,000 held grossly excessive and in violation of Due Process clause in light of $4,000 actual damages award (Ratio 500:1)
   D. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, (1991) – Alabama's common-law method for assessing puni-

tive damages held not to be so inherently unfair as to violate due process and be per se unconstitutional

III. Mississippi Standards of Review

A. When a trial court places the issue of punitive damages before a jury, "that decision should stand absent compelling grounds for reversal." *State Farm Mut. Auto. Ins. Co. v. Grimes,* 722 So.2d 637, 642 (Miss.1998)

B. On appeal, the jury's award of punitive damages will be reversed "only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court." *Valley Forge Ins./CNA v. Strickland*, 620 So.2d 535, 541 (Miss. 1993).

C. Mississippi Supreme Court has "expressed a great reluctance" to interfere with "punitive damages assessment[s] made by a jury," and inquires into "whether the proof is sufficient to sustain an assessment of punitive damages." *Gardner v. Jones,* 464 So.2d 1144, 1150 n. 5 (Miss.1985).

D. Standard of review will not permit that the finding of the trier of fact to be disturbed on appeal if there is substantial supporting evidence. *Dungan v. Dick Moore, Inc.* 463 So.2d , 1094, 1100 (Miss. 1985).

E. Standard of review for the denial of a punitive damages instruction is as follows: The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper only if the trial court can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inference which may be drawn from the evidence in favor of the requesting party, that no hypothetical reasonable jury could find the facts in accordance with the theory of the requested instruction. *Willard v. Paracelsus Health Care Corp.,* 681 So.2d 539, 543 (Miss.1996).

F. Federal Courts of Appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001).

IV. Elements in Punitive Damages Award in Mississippi

Four elements guide the finder of fact in determining the total sum to award for punitive damages. The elements are as follows: (1) the amount awarded should serve to punish the insurer and deter the same or similar conduct in the future, (2) the sum awarded should deter others from committing similar offenses, (3) the amount awarded should coincide with the insurer's economic ability and financial worth, and (4) the amount is to compensate the litigant for his/her "public service" by bringing the action. *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172, 1190 (Miss.1990).

V. Ratio of Actual to Punitive

A. "No fixed legal ratio between actual and punitive damages exists. No bright line of demarcation tells us when exemplary damages are excessive. It would be difficult, if not impossible, to state a rule with absolute precision. *C & C Trucking Co. v. Smith,* 612 So.2d 1092, 1107 (Miss. 1992).

B. [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW of North America v. Gore*, 517 U.S. 559, 582 (1996).

C. 4-to-1 ratio between punitive damages and actual damages "may be close to the line" of "constitutional impropriety," *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991).

D. In *Fred's Stores of Miss. V. M & H Drugs* 725 So.2d.

902 (Miss. 1998), an award of $650.00 was sufficient to support $300,000.00 in punitive damages.

IV. Percentage Net Worth of Tortfeasor as a Punitive Damages Factor

MISS. CODE ANN. § 11-1-65(e): "In all cases involving an award of *punitive damages*, the fact finder, in determining the amount of *punitive damages*, shall consider, to the extent relevant, the following: *the defendant's financial condition and net worth* ...

In order to challenge on appeal that an award of punitive damages is excessive, "evidence of net worth must be presented at trial, or error in the amount of punitive damages is waived." *C&C Trucking Co. v. Smith*, 612 So.2d 1092, 1105 (Miss. 1992).

A. *Valley Forge Ins. Co. / CNA v. Strickland*, 620 So.2d 889 (Miss. 1992).

Punitive damages award of $1 million based on insurer's assertion of frivolous subrogation claim was not excessive where award was 1.5 percent of insurer's net worth and insurer's conduct delayed insured's recovery from tort-feasor.

1.5% of Defendant's Net Worth

B. *Sudeen v. Castlebury*, 794 So.2d 237 (Miss. App. 2001). Defendant Sudeen testified that his net worth was $2,500,000 and the trial judge awarded $100,000 in punitive damages and attorney's fees. In upholding the punitive award, the Court reasoned: "We do not believe this amount to be injudicious. The award of punitive damages and the amount is within the discretion of the trier of fact." (citing *Polk v. Sexton,* 613 So.2d 841, 845 (Miss. 1983)).

4% of Defendant's Net Worth

C. *Ross-King-Walker, Inc. v. Henson*, 672 So.2d 1188 (Miss. 1996). Punitive damages of $135,000 were not excessive for insurance agent's misrepresentation and breach of fiduciary duty in telling business owner's surviving spouse, child, and legal representatives that workers' compensation death benefits were available for owner's death while working, even though award was more than triple actual damages, and even though agent allegedly had *negative net worth*; record reflected that agent had $943,522 in assets.

14% of Defendant's Net Worth

D. *James W. Sessums Timber Co., Inc. v. McDaniel*, 635 So.2d 875 (Miss. 1994). Although net worth of defendants was not fully developed, defendants' net worth combined with insurance coverage carried by one of the defendants supported $70,000 punitive damages award in favor of motorist; net worth of defendants was at least $116,898.24 and liability insurance policy provided single limits coverage of $500,000.

60% of Defendant's Net Worth

E. *C&C Trucking Co. v. Smith*, 612 So.2d 1092, 1105 (Miss. 1992). $50,000 punitive damage award upheld despite parties' stipulation that the Defendant had zero net worth. The Court concluded that a jury may indeed properly assess punitive damages to a party having no net worth.

100% of Defendant's Net Worth

(To the mathematician, an indiscernible %)

Other Mississippi Punitive Damage Cases

1. Sudeen v. Castleberry,
   794 So.2d 237
   Miss.App.
   Feb 20, 2001
2. Holland v. Mayfield,
   1999 WL 353023
   Miss.
   Jun 03, 1999
3. Thomas v. Harrah's Vicksburg Corp.,
   734 So.2d 312
   Miss.App.
   Feb 23, 1999
4. Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.,
   725 So.2d 902
   Miss.
   Sept. 10, 1998
5. Ross-King-Walker, Inc. v. Henson,
   672 So.2d 1188
   Miss.
   Mar 28, 1996
6. Sessums v. Northtown Limousines, Inc.,
   664 So.2d 164
   Miss.
   Sep 07, 1995
7. Ciba-Geigy Corp. v. Murphree,
   653 So.2d 857
   Miss.
   Jul 07, 1994
8. James W. Sessums Timber Co., Inc. v. McDaniel,
   635 So.2d 875
   Miss.
   Apr 07, 1994

9. Duggins v. Guardianship of Washington Through Huntley,
   632 So.2d 420, 35 A.L.R.5th 909
   Miss.
   Dec 16, 1993
10. Valley Forge Ins. Company/CNA Ins. Co. v. Strickland,
   620 So.2d 535
   Miss.May 13, 1993
11. Dynasteel Corp. v. Aztec Industries, Inc.,
   611 So.2d 977
   Miss.
   Dec 31, 1992
12. C & C Trucking Co. v. Smith,
   612 So.2d 1092, 61 USLW 2420
   Miss.
   Dec 17, 1992
13. Beta Beta Chapter of Beta Theta Pi Fraternity v. May,
   611 So.2d 889, 80 Ed. Law Rep. 755
   Miss.
   Dec 17, 1992
14. Smith v. Dorsey,
   599 So.2d 529, 75 Ed. Law Rep. 692
   Miss.
   Apr 16, 1992
15. Andrew Jackson Life Ins. Co. v. Williams,
   566 So.2d 1172
   Miss.
   Jul 25, 1990
16. Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n,
   560 So.2d 129
   Miss.
   Oct 04, 1989
17. Whittington v. Whittington,
   535 So.2d 573
   Miss.
   Nov 23, 1988
18. Independent Life & Acc. Ins. Co. v. Peavy,
   528 So.2d 1112
   Miss.
   May 04, 1988

19. Mutual Life Ins. Co. of New York v. Estate of
    Wesson by Hall,
    517 So.2d 521
    Miss.
    Nov 12, 1987
20. Employers Mut. Cas. Co. v. Tompkins,
    490 So.2d 897
    Miss.
    Jun 04, 1986
21. Aetna Cas. & Sur. Co. v. Day,
    487 So.2d 830
    Miss.
    Apr 30, 1986
22. Cobb v. Cobb,
    485 So.2d 691
    Miss.
    Mar 19, 1986
23. National Life and Acc. Ins. Co. v. Miller,
    484 So.2d 329
    Miss.
    Nov 13, 1985
24. Bankers Life and Cas. Co. v. Crenshaw,
    483 So.2d 254
    Miss.
    Sep 11, 1985
25. State Farm Mut. Auto. Ins. Co. v. Daughdrill,
    474 So.2d 1048
    Miss.
    Jul 24, 1985
26. Jesco, Inc. v. Shannon,
    451 So.2d 694
    Miss.
    Feb 29, 1984
27. T.C.L., Inc. v. Lacoste,
    431 So.2d 918
    Miss.
    May 11, 1983

28. First American Nat. Bank of Iuka v. Mitchell,
    359 So.2d 1376
    Miss.
    May 31, 1978
29. Progressive Cas. Ins. Co. v. Keys,
    317 So.2d 396
    Miss.
    Aug 11, 1975
30. Honda Motor Co., Ltd. v. Oberg,
    512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336, 62 USLW 4627, Prod.Liab.Rep. (CCH) P 13,895
    U.S.Or.
    Jun 24, 1994
31. Pacific Mut. Life Ins. Co. v. Haslip,
    499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, 59 USLW 4157, 18 Media L. Rep. 1753
    U.S.Ala.
    Mar 04, 1991
32. Carroll v. Jaques Admiralty Law Firm, P.C.,
    110 F.3d 290
    5th Cir.(Tex.)
    Apr 18, 1997
33. Quest Medical, Inc. v. Apprill,
    90 F.3d 1080
    5th Cir.(Tex.)
    Aug 12, 1996
34. Grizzle v. Travelers Health Network, Inc.,
    14 F.3d 261, 64 Fair Empl.Prac.Cas. (BNA) 73, 63 Empl. Prac. Dec. P 42,830
    5th Cir.(Tex.)
    Feb 03, 1994
35. Eichenseer v. Reserve Life Ins. Co.,
    934 F.2d 1377, 60 USLW 2083
    5th Cir.(Miss.)
    Jul 11, 1991
36. Bhandari v. First Nat. Bank of Commerce,
    808 F.2d 1082, 55 USLW 2425, 22 Fed. R. Evid. Serv. 644
    5th Cir.(La.)
    Jan 29, 1987

37. Jackson v. Johns-Manville Sales Corp.,
    781 F.2d 394, 54 USLW 2399, Prod.Liab.Rep. (CCH) P 10,893
    5th Cir.(Miss.)
    Jan 22, 1986
38. State Farm Mut. Auto. Ins. Co. v. Daughdrill,
    769 F.2d 1070
    5th Cir.(Miss.)
    Aug 30, 1985
39. Woods-Drake v. Lundy,
    667 F.2d 1198
    5th Cir.(Miss.)
    Feb 18, 1982
40. Shingleton v. Armor Velvet Corp.,
    621 F.2d 180, 6 Fed. R. Evid. Serv. 685
    5th Cir.(Ga.)
    Jul 10, 1980
41. E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas,
    551 F.2d 1026, 21 UCC Rep.Serv. 1061
    5th Cir.(Ala.)
    May 09, 1977
42. Rowley v. First Columbia Life Ins.,
    741 F.Supp. 1259
    S.D.Miss.
    Dec 29, 1989
43. Crook Motor Co., Inc. v. Goolsby,
    703 F.Supp. 511, 8 UCC Rep.Serv.2d 363
    N.D.Miss.
    Dec 21, 1988
44. Guy v. Commonwealth Life Ins. Co.,
    698 F.Supp. 1305
    N.D.Miss.
    Nov 10, 1988
45. Eichenseer v. Reserve Life Ins. Co.,
    682 F.Supp. 1355
    N.D.Miss.
    Mar 18, 1988

46. Liston v. Home Ins. Co.,
659 F.Supp. 276
S.D.Miss.
Jul 22, 1986

MR. REISTRUP: Thank you, Judge. Thank you, Judge. All right. Our next panelist is the Honorable Betty W. Sanders who is Circuit Judge of the Fourth Circuit and based in Greenwood [Mississippi]. She tells me that she covers Leflore, Sunflower and Washington Counties, and that they have not had any of these notorious cases yet. She was close to getting a Phen-fen case, but had to recuse herself. So, so far she's escaped these cases. Judge Sanders.

JUDGE SANDERS: Thank you. I don't know if I've really escaped; I had one removed to federal court, and after about eighteen months, it's back. And on the Phen-fen—what I was saying to him, we started out with that case and American Home Products retained my husband, so I had to recuse myself from that.

I am going to step away from my prepared comments and try to respond to some of the things that we have heard today. As a trial judge, I feel like I'm saying this with one hand tied behind my back because I don't have an opinion—I can't express an opinion about some of these things, and I'm just kind of jumping up down here wanting to say something, sitting here next to Grady, feeling his passion as he spoke with that.

I don't know if our panel, with the two past bar presidents and General Reynolds, have that working relationship that some of the other panelists have had, but I think I know these two guys' spouses—I have a closer relationship with them than I do the two attorneys here.

I never did hear the seven counties that we were so concerned about today. I heard a lot about Holmes County. Holmes County adjoins Leflore County where I sit. Holmes County used to be a part of the Fourth Circuit Court District before redistricting. Now, Holmes County and Leflore County, the demographics are not all that different. The joke around the courthouse is plaintiffs' lawyers are circling the Leflore County Courthouse just waiting for that first big hit so they can swoop down.

A couple of months ago, an African-American jury in Leflore County—oddly enough all female; it was not my case—returned a zero verdict against an automobile manufacturer. So I hear this about the minorities being the runaway juries, but that's not what I see in the Delta counties, and the Delta counties are majority minority juries.

Another observation that I have made with the juries that I have and, to date, I've not had an all African-American jury, but more times than not it is the Caucasian male that comes out of the jury room with the jury verdict. So I'm just trying to understand, and I wish I knew these seven counties that we were talking about. I agree with Attorney Shannon; our system works. I agree with Attorney Anderson when he says some of us, and maybe I can add Tollison to this too, some of us are really passionate about this because the jury system is the only example that I can give to you where we are all equal. Each has a vote and each and every vote carries the same weight. Our system works. I don't know how I can emphasize that any more.

Another thing that was said, and I feel like with all these notes I have made today that I'm ruling from the bench. You know, reading the notes, turning sideways trying to see what we have here. I wanted to say a few words. Justice Carlson mentioned the time standards, and we have been talking in my district at every docket call about the time standards. I've received input from both the criminal bar and the civil bar about ways that we can improve. I agree that we need to move the cases through the system.

On the criminal side, we have developed procedures that will get the plea offers out, that will move the discovery up, and will assist our sheriffs who keep fanning the flames that we need more jails, by getting the pretrial detainees out of the system sooner.

On the civil side, the biggest problem that we have is four judges in the district and one courtroom. We just cannot get to the courtroom. So what I have done is move my cases first to the federal court. What we found there is a two-week med[ical] mal[practice case] becomes a three-week trial because we have to be out of the courthouse by five o'clock. The attorneys will say about three o'clock, "Judge, this next witness is going to be a lengthy witness, so I think we should stop here." You say, "Oh, okay." Next morning, guess what, that witness is twenty minutes. So it has extended the time.

So what we have done is move the cases thirty miles away to Sunflower County. We have agreed to pick the jury in Washington County and try the case in Sunflower County. Of those four cases—and all of the attorneys in these cases agreed. I don't know what I'll do if they say no, I really don't want to do that; I'll cross that bridge when I come to it, I guess, but all of those cases have settled. If you agree to move the trial thirty miles away, I can hear the case in three months. If you want to stay in Washington County—four judges, one courtroom—it's going to be about eighteen months. So if we're willing to make these changes, again, I believe the system works.

And there was one other thing—oh, about the changes in the judicial performance. I sit on the current Judicial Performance Commission, and Justice Carlson did not mention this morning that also if you make a donation—is it $2,000 to the appellate judge and $1,000 to the trial judge?—you can also be removed from that case. So if you don't want to "in your face" use your peremptory challenge or your client use that, then you make the donation which we won't know anything about. Then, when the judge is assigned, you say "Well, Judge, I'm so sorry, I made that donation; I really supported you, and I'm so sorry, but you have to be removed from this case." So, of course, you can see that's a cheap price, a thousand bucks, and you'll never get me on your case.

I also agree with General Reynolds about the *Cooper* standards. We are aware of that, and we are following that and the three guideposts in the *BMW* case. But I want to say I think the judges—I'm going to jump back and then I'm going to go there again, reading from these notes. The judges in this state listen, respond, discuss and act. We want to maintain judicial independence. But some things are moving in this state which I think are eroding the very core of that judicial independence. Campaign finance is a topic on the front burner. We have discussed it; we have discussed it; we have discussed it. I don't know what solutions we will come to. But I think we have discussed it a long time, and we should be on our way now to some proposals for the upcoming elections next year.

Moving back to our topic now, punitive damages, I think that our courts, and sitting as a trial court, you are, of course, aware that we have the discretion to determine whether or not the case proceeds to that second phase of punitive damages. Our Supreme Court has said that that decision would not be disturbed absent some compelling ground. I think that our Supreme Court does look to conduct. So if you say the verdict is excessive, I think we are going to have to balance that with what is viewed as irreprehensible conduct of that defendant. Punitive damages are to punish. Punitive damages are to deter. Punitive damages based on the financial worth. Punitive damages based on the reprehensible conduct of the defendant. And I think I better stop here. We trial judges aren't used to being cut off so . . .

MR. REISTRUP: Thank you, Judge. You saved me. Can we have questions? Sir?

QUESTION: This is for Mr. Anderson.

MR. REISTRUP: Could you identify yourself, and I can't hear you.

QUESTION: My name is Steve Cox. You gave an example of four doctors in Greenville who were not able to get insurance for the hospital. (INAUDIBLE) The question that comes to my mind is: Did it ever occur to you or any other advocate for the four doctors that maybe they were bad doctors, and we don't need them anyway?

JUSTICE ANDERSON: You said maybe they are bad doctors?

(INAUDIBLE RESPONSE FROM THE AUDIENCE)

JUSTICE ANDERSON: As it related to these physicians, it was because of the cost involved; their premiums went up three times from what it was previously, and they couldn't afford it. And this small community couldn't afford to lose them.

(INAUDIBLE RESPONSE FROM THE AUDIENCE)

JUSTICE ANDERSON: You're absolutely right. You could be correct. All four of them could be, but I don't think they are because they were credentialed by the committee, and the credentialing committee said that the hospital needed to maintain them. But you could be right. Sometimes physicians, like lawyers, aren't always as capable as they should be.

MR. REISTRUP: Before we take any more questions, I'd like to ask General Reynolds to respond to some of the things that he heard.

MR. REYNOLDS: I would just like to make one additional observation, and it goes to what Grady Tollison said and also Judge Sanders, and it gets back to the jury system. And I've been at this game for over thirty years, and I am certainly one that would stand up and say immediately and loudly and consistently that I believe in the jury system. It works well, but I also think that the jury system works well and is something that all of us who have been in the courtroom applaud mainly with respect to issues of liability and compensatory damages where they are looking at evidence and they are following instructions.

When you get into the punitive damages area, you really cut the jury loose, and one of the problems we have been facing with punitive damages up until recently is that it's received very little attention during the trial. And I think that the Supreme Court's decisions in *BMW* and *Cooper* send a pretty strong signal to the defense bar, as much as to the plaintiff's bar, that it's going to be necessary to begin to concentrate a lot more meticulously on the kind of evidence that is going to be relevant to the size of the punitive award and to give some better guidance to the jury in terms of the determination that it is asked to make after all is said and done as to what the moral judgment is on punishment or deterrence. And there are going to be lines that are going to have to be drawn that are new lines in the courtroom and in terms of the evidence that comes in and how you handle it. But coming out here today, I jotted down a couple of things that it seems to me are going to be fair game now for the evidentiary record, and I think an essential part of a trial where punitive damages are likely. Their relevant wealth issue had better be addressed by the defense bar as well as the plaintiff's bar in some fashion.

The reprehensibility issue, insofar as you're talking about whether it's deliberate conduct, repetitive conduct, deceitful conduct, concealment, systemic; those kinds of evidentiary issues had better be addressed by the defense bar as well as the plaintiff's bar.

The defendant's attitude toward its misconduct is another whole area that normally might not get into the record or be in the record, and I think that whether the defendant is indifferent, whether the defendant is taking steps—if you have an occasion to read the *Exxon Valdez* opinion that came out this week, a good portion of it where they basically sent it back because the punitive award was way too high. A good portion of it addressed what Exxon had done in terms of the cleanup and in terms of the after-effects of that as some kind of a mitigation that would play in terms of assessing the size of the punitive damages and the nature of the conduct.

The effect of the conduct on others. What ripple effect it had. Whether this was conduct that would impact only one individual or multiple individuals. We heard about the asbestos cases, and that rings one way, and you have other torts that don't have those kinds of ripple effects such as the *Cooper Industries* case which goes the other way. The probability of recurrence. I think it's fair to say that the asbestos issue, as far as recurrence is concerned, from now on is probably minimal, and that's certainly a relevant factor and something that I think from an evidentiary standpoint is going to have to be addressed.

The relationship of the parties, whether it's a fiduciary relationship, the disparity issue in some way between compensatory and punishment, the relationship of the punishment to the crime, if you will, and then other treatments. Those are a few. There are more, but the challenge is going to be how to address this in an evidentiary way before the jury because I agree, our jury system is very, very good, but it's only as good as we give it some instruction on and we give it some guidance on. The jury hears evidence. They hear what we have to say. They assess it. And in the punitive area up until recently they've then been cast adrift after going through that whole analysis, and that's why the courts have come in and said that the appellate courts are now going to apply these guideposts and look at these factors. And I would simply say that this is not a debate over whether we should have punitive damages or should not have punitive damages; it's a debate over whether an assessment of punitive damages is an appropriate amount given the conduct that the juries found and the compensation that's been handed out. And it's going to become, and necessarily become, much more of an evidentiary issue that the lawyers are going to have to grapple with better if we expect our juries to do as good a job in this area as they generally do in the other areas.

MR. TOLLISON: I must say that since this symposium was about Mississippi litigation today, and since we must look at courts of records to make a determination, I have looked at every case of punitive damages in the last fifteen years in Mississippi, the largest—and I'll stand corrected; I will—was the *Mutual of New York* on the Coast, seven million dollars reduced to two million—you were on the court. Is that the largest punitive award been approved by the Mississippi Supreme Court? And I think we have to look at courts of record, but what I guess I'm trying to say is, first, let's see where the problem is in our appellate courts, and maybe there is a problem about posting bond, and that's been addressed by our Supreme Court. But if seven million is the largest, and that was reduced to two [million], let's talk about that if we are going to criticize the Mississippi court system. I think we have to start there. That's my response to that.

QUESTION: Mr. Reynolds, I've gotten two punitive verdicts in Mississippi in the past year, one for thirty-two million dollars and one for seventy-five million dollars. I agree with you about the objective, but what I've found is the defense has been ill-prepared to deal with that. My experience in both cases was the jury got teed-off at the corporation when the corporate representative and the corporate officers got up and just blatantly lied. And like I said, I think the defense bar is going to have to come up and figure out when you present your case what kind of case are you going to present on the evidentiary case. But when the jury gets teed-off at them, it's not anything that the plaintiff did; it was more the way they handled the evidence, in my experience, but I think that punitive damages are, you know, are being singled out unnecessarily to some degree. Two percent of the verdicts—two percent of the verdicts involve punitive damages in the country. I heard that statistic earlier today, but, you know, the defense bar—what you've got to look at is each case is different on its own merits, and what I found in both cases, I had—the defense was ill-prepared in their presentation. If maybe they had gotten up and done a little bit better job it would not have been so bad.

JUSTICE ANDERSON: Judge, please let me respond.

MR. REISTRUP: Go ahead.

JUSTICE ANDERSON: I would like to just comment on that thirty-three million dollars.

AUDIENCE: Thirty-two.

JUSTICE ANDERSON: Thirty-two? And just say, I remember, I don't know if it was you or Flip that made a comment in the punitive phase that Lord so-and-so back over in London-

AUDIENCE: That was Flip.

JUSTICE ANDERSON: Flip said it! If you give him ten million dollars, he's going to break out a bottle of champagne and celebrate.

QUESTION: Yeah, that was Flip.

JUSTICE ANDERSON: And he didn't even own enough stock to celebrate on, but I think that that was the real—

MR. REISTRUP: Thanks. We've got to move on to the next panel. Thank you very much, all the members of this panel.

REGULATION THROUGH LITIGATION

Panelists
Ronald J. Rychlak, Moderator
Francis McGovern
The Hon. William H. Pryor

MR. HEWINS: This panel—I do want to apologize. This panel has unfortunately been decimated. Two out of the three were flight-related, and the third involves the country of Switzerland. Luckily, General Pryor agreed to still come and speak and Francis McGovern is now a panelist for the second time, graciously helping us out here. The moderator is another professor, Ron Rychlak, from here at the University of Mississippi Law School. He is the Mississippi Defense Lawyers Association Professor of Law at Ole Miss, and he's also the Associate Dean for Academic Affairs. He served as delegate to the meetings on the establishment of an International Criminal Court. Not much relation to today's subject, but still a very interesting note. So I give you Professor Rychlak.

MR. RYCHLAK: Thank you very much, and I do want to compliment particularly our students putting this together. I think it's been a wonderful program. Sam, Dean Davis, wanted me to express his apologies for being unable to be here, but he's a Commissioner on the Uniform Laws, and he had to be called away this weekend to work on that. I have been upstairs much of the day because we're trying to interview and employ a gentleman sitting in the back of the room right now, Mercer Bullard, convince him what a beautiful place this is to come and work, so we've been busy upstairs. And I've been walking around on a newly hurt ankle, which I can blame on—could blame on a lot of things, but the truth is that my four-year-old daughter jumped on it the other night; it's a sign of age that that would do this to me.

If a governmental body considers an activity dangerous or immoral, it may not have the will or the courage to outlaw it. In such case, the modern American governmental unit may resort to a fairly new remedy—it may sue. Some commentators charge that ours is now a government of lawyers, by the lawyers, and for the lawyers. According to one account I read in preparation for this discussion, the symbol of our way of life today is no longer the Statue of Liberty holding a torch, but a woman holding a hot cup of McDonald's coffee. Legislation by litigation is happening at all levels of government. State attorneys general scored big with the suit against tobacco companies. Cities are bringing suit against gun makers to recover medical costs of gunshot wounds. The plaintiffs in these cases point out that Congress and state legislatures have an innate inability to act against industries that make big campaign contributions and have powerful lobbies or constituencies. Cancer and gunshot wounds are expensive, so why not sue?

On the other hand, Judge David Schrader of the Los Angeles Superior Court in a case this past May ruled,

> The use of the judicial system to target firearms to solve the problem of their criminal misuse is inappropriate. Legitimate firearms have a value for our society in sport, leisure, and self-defense. Since the solution to the problem of criminal misuse of firearms would broadly affect society, in our democracy crafting such a solution would require public hearings, consideration of public opinion. This is the purpose of our legislature."

So is it the legislature or is it the courts?Is there an appropriate role for each, and have we wrongly blurred those roles? That is our question for today, and we have two fine panelists. I'll talk about Attorney General Bill Pryor in a moment, but first I'd like to welcome Francis McGovern who has stepped in at the last moment. I understand he just did a presentation on this very topic in France. And so he's well prepared, and we look forward to hearing from him.

MR. MCGOVERN: Bon Jour. I actually did give the damn thing in French, but I won't do it here. My interest in what I call social issue towards—and I've written a couple of law review articles about it—comes from a first-year torts class I taught at Stanford. I had about thirty-one students, and I said, "You know, tell me a little bit about you—I'm a visiting professor, which is always a little bit difficult. Tell me your background; what do you want to do?" And I asked the first one and he had a Ph.D. in molecular biology. Okay. What do you want to do? I want to go into intellectual property with a dot-com. Okay. Next one, a Ph.D. in physics. What do you want to do? Intellectual property, work for a dot-com. And I went around the room and damn near everyone of them had an advanced degree in engineering or one form of science or another, great expertise in computers; every single one of them wanted to go into IP and work for a dot-com, and I'm teaching torts. Okay? These kids could care less about torts. Plus the way their minds worked, everything was a one or a zero. There wasn't anything in between. There was no gray. There was plenty of matter, but it wasn't gray. And as a result I said, "How the hell am I going to teach these people torts?" So I taught the class as social issue torts: tobacco, handguns, HMO, holocaust; those kinds of issues, and that's how I got kind of interested in this. And I was asked to give a paper with Owen Fiss and with Mark Tushnet and a bunch of people in France about the use of courts in the political arena. And my topic was the use courts in public health reform, but I'll broaden it a little bit so you'll have plenty to shoot at.

Now, I'm a professional neutral. I fly at 20,000 feet. Okay. And I'm not going to stand in for Dickie [Scruggs]. So I'll just spend a little time—but then I've got to go to the airport—giving you what I think is sort of the big picture of what's going on here, and then y'all can run with it from there.

The Europeans and most folks do ex ante regulation to take care of social reform. Litigation is expost. In the United States, Bob Kagen, who's a political scientist that I teach with at Berkeley as well has written a book entitled *Adversarial Legalism*. His point is that in American society, going back to the Topes Bill, what we find is that lawyers turn litigation into a vehicle that's really political in nature. The classic case he has is the dredging of the harbor in San Francisco and Oakland. And he calls it "adversarial legalism." We have a phenomenal history of turning political issues into litigation. We've done it for years and years and years. The Civil Rights movement, for example, is one that is probably the prime example where you had stagnation in Congress, and you went to the courts and you ended up with major, major change. This is nothing new and different.

Question number one. Is what the plaintiff's lawyers are doing now in the context of social issue torts really different from what's been done with litigation in many, many, many other contexts? And I would focus on it in the following way: Number one. No, it's not really very different. What is different is the plaintiff's bar is getting interested in social issues in a global way. Instead of being legal entrepreneurs, they're becoming policy entrepreneurs. Instead of personal injury lawyers, they are becoming public injury lawyers. They are doing well by doing good. That is to say the thrust of what's happening is no different than lawyers have been doing in any number of contexts. What's different is the segment of the bar that seems to be active in pushing more global kinds of issues has been changed. And let's look at the history of this. My argument is where that comes from really are the mass torts. Where it comes from Mississippi, Louisiana, Alabama, Texas, the—I used to call East Texas the fertile crest of the asbestos industry. We look at those cases, and we see over the last—I don't know, Tom Tardy and I have been working on it now for twenty some-odd years—over the last twenty-five years what we've seen is plaintiff's lawyers, when you look at the quote from Frances Hare, used to get $15 thousand for a wrongful death case. Now what is it? Twenty-five million dollars for a minimal asbestos case. You've got a big pot of money that lawyers have put together, and those lawyers, what are they going to do with it? I used to look at the Silicon Valley folks and I said well, what's the difference between the gazillionaires in Silicon Valley and the tobacco lawyers? And it's pretty much the same. People tend to invest their money in what they know. And so we've seen a lot of lawyers who made a lot of money through tobacco and through asbestos reinvesting that money in HMO cases, in handgun cases, in genetically-modified plants, holocaust, you name it. So we saw an evolution in the plaintiff's bar of slowly but surely putting together the resources where the plaintiff's bar can go toe-to-toe on a financial basis with the biggest corporations. I'll never forget watching Henry Cravitz and Fred Barron one time sort of go toe-to-toe, and these are a plaintiff's lawyer and, in effect, a venture capitalist on an equal plane. That's a major change.

Number two: plaintiffs' law firms. Plaintiffs' law firms were always really small. You just didn't see very large plaintiffs' law firms. They didn't have the capacity to be able take on these big kinds of issues. Now, you see consortia of plaintiffs' law firms with resources that are pretty much equal to what you might see in the corporate law firms.

What about the substantive law? I would make an argument that one of the biggest—and I'd be interested to know Victor's perspective on this. In 1965, when the *Restatement (Second) of Torts*, Section 402A was adopted, there was one case out there, for all practical purposes; it wasn't a restatement. Trainer and Prosser decided to write Section 402A and create strict liability in tort for product liability cases. And when we taught that, we looked to see legal doctrine; what was there, what cases would you rely on; there weren't any. It was all public policy. It didn't make any difference what the law was. In the latter part of the 60s and the 70s and into the 80s, there wasn't any precedent. And so judges and lawyers—I was trained as a defense lawyer, defending General Motors and watched. The plaintiff's lawyer didn't pay any attention to the doctrine because the answer was always public policy. I remember judges—when I did *Hopkins v. General Motors* and argued it was a misuse case, where the only case out there was a Fifth Circuit case and the state judge in Houston said, "Well, I don't think they're right; I think the policy should go the other way." We had an entire generation of lawyers who didn't really—didn't make a lot of difference what the doctrine was, but if the policy was good, they'd go for it. And I'd say exactly the same thing is happening now with handguns and with tobacco. If you ask the lawyers what were the legal theories that you used here in equity court in Mississippi for that action they had on behalf of Mississippi against the tobacco companies, you'd be hard-pressed to see what legal theories they really had. There weren't too many legal theories around to be able to support it, but that's okay; the policy was there. HMOs. You ask what are the legal theories here? And on and on, and I would attribute that to a generation of lawyers who were trained on public policy as the basis for the law rather than legal doctrine.

Procedure. Judges—shoot, you go back in the early 80s when I was first appointed as a special master, Judge Tom Landrose in Cleveland said, "I've got 126 asbestos cases; what am I going to do?" Well now, you know, maybe 126,000 might get our attention. Judges and procedure have been accustomed to these mega kinds of cases. Shoot, the cases against the HMOs—it's every HMO in the country is being sued in one court. Twenty-five years ago that would have been mind-boggling. It's not mind-boggling anymore. There was this evolution of mass torts that I would argue has led to the use of attorneys general, for example. The plaintiff's bar getting together with AGs in any number of these cases. That has led to this particular phenomenon.

Now, what's unique about the phenomenon other than the fact that it is the traditional personal injury plaintiff's lawyers, not all of them but some of them, that are pushing it? I would argue there are three things. Number one. The plaintiff's lawyers figured out how to monetize social issues. The social issue on tobacco was out there for a long time; we don't want teenagers to smoke. But the innovativeness of the plaintiff's bar led them to figure out a way to turn that into money, and when you can do that, then you have a financial incentive to proceed. Number two. The plaintiff's bar is just phenomenally inventive in the way in which it frames issues. And it frames issues in a way that enhances their success in large part by framing issues to deal with emotional types of decision-making as much as analytical kinds of decision-making. So your typical policy wonks in Washington go off on some type of numerical analysis where the plaintiff's lawyers are very, very good at taking an issue—I used to try cases against Joe Jemail, and you probably know Joe from Houston. Joe's the best I've ever seen. I mean, he can take a case, turn it into an issue that was an absolute winner, and it was the way he did it. For example, in the tobacco cases, nobody was winning these cases—individual cases because of assumption of risk. The tobacco companies were winning every single case on assumption of risk. So what did the plaintiff's lawyers do? They sued on behalf of the state. The last time I looked, the state didn't smoke, so it couldn't be guilty of assumption of risk. And, as a result, by reframing the issue that way, they were able to succeed.

And I can go on and on about other examples of how reframing the issue in a very innovative way that the plaintiff's lawyers have done that the policy wonks would never in a gazillion years think of. And then thirdly, what the plaintiff's bar has been able to do is use the litigation forum. Juries, and also a number of psychological biases, most notably hindsight bias; that's the helpful part of the ex post decision making. It's a lot easier when you see someone who's hurt. When you see someone who's hurt, it's a lot easier for the jury to make the connection between the conduct and something going wrong as opposed to ex ante kinds of decision-making. And I could go through five or six other kinds of biases like that. So I would argue that the phenomenon here is a natural evolution—and I'm not saying it's good or bad. I'll leave that to y'all because there are very strong arguments that can be made that it's good. You go back to the Firestone 500s; you go back to DES; you go back to any number of products. The phenomenon has been a natural evolution of the mass torts that has led a relatively small group of folks to focus on the issues and reframe them, monetize them and try to resolve them in a context that's more conducive to their success. And I would argue that's the nature of the phenomenon that we have going on right now. Thank you very much.

MR. RYCHLAK: Thanks, Professor McGovern. He's got to leave to catch his flight. He stayed here late to help us out, but I appreciate it very much. He mentioned Dickie Scruggs, who I'd hoped was going to be here. You may know that Dickie pledged $25 million dollars to this University, a million dollars a year for twenty-five years. Our dean, Sam Davis, told me that he would match that; he was pledging twenty-five dollars a year for a million years.

Our next speaker today, Attorney General Bill Pryor, took office as Attorney General of Alabama in January of 1997. At that time, he was the youngest Attorney General in the United

States. On November 3, 1998, he was re-elected to a full four-year term. A native of Mobile, he graduated magna cum laude in 1987 from Tulane University School of Law, where he was editor-in-chief of their Law Review. He has a national reputation as a conservative leader for the cause of limited government, judicial restraint and free enterprise. He received the Guardian of Religious Freedom Award from the Justice Fellowship and Prison Fellowship Ministries, the Civil Justice Achievement Award from the American Tort Reform Association, the Friend of the Taxpayer Award from the Alabama Citizens for a Sound Economy and the Harland B. Carter Award from the National Rifle Association's Institute for Legislative Action. He's a member of the American Law Institute, the Legal Policy Advisory Board of the Washington Legal Foundation and The Federalist Society. General Pryor.

ATTORNEY GENERAL PRYOR: Thank you. I know I should speak briefly because I'm the only thing that stands between many of us and a trip to Memphis to the Rendezvous to eat some barbecue—something I wanted to do. I appreciate, though, being asked to come to Oxford. My first trip to Oxford. I came with some trepidation. There's both something discouraging about coming to Oxford at this time as the Attorney General of Alabama and something encouraging. The discouraging thing is my first trip to Oxford follows a trip of my favorite football team that ended up in a way that it's never ended up in a visit to Oxford a couple of weeks ago. Eli Manning is really something, especially in the fourth quarter.

The encouraging thing, though, is there's been a remarkable change in the climate of the legal system and the economic systems, I would say, of both our state and the state of Mississippi. I had the pleasure and privilege of speaking to the Mississippi State Bar Convention this summer, and I was looking forward to the rematch with Dickie Scruggs. We debated in Sandestin this summer on this very topic, and when I first heard the news before coming up here that Dickie wasn't going to be able to make it I knew, of course, that the reason was that Dickie just couldn't stand the thought of the rematch. But then humility and my wife got the better of me, and I realized that maybe there was a little bit more at work here.

After all, Dickie's a billionaire, and I'm not. And Dickie's got a client in Switzerland, and I don't. And when given the opportunity of debating Dickie Scruggs, I found that a very attractive opportunity; whereas, if you're a billionaire with a client in Switzerland, you know, maybe a rematch with Bill Pryor wasn't that big a deal. So in any event, it's nice to be here.

When I was debating Dickie this summer, I began my remarks by noting that contrary to any rumors that you may have heard, I am not here to announce the opening of an office in the state of Mississippi like many Alabama lawyers have been known to do for the last couple of years. The only thing I can say for those of you who now have these new competitors is we don't miss them; we don't want them back. And it seems like every time there's a sitting of the Mississippi Bar Exam and exodus of Alabama lawyers, a new automobile plant opens in my state, whether it's Hyundai or Honda or Toyota or Mercedes. I promise, we don't want them back.

My focus today, though, is a little bit different. It's on the state attorneys general and other public officials who pursue lawsuits of dubious legal merit against businesses to extract settlement agreements that amount to thinly disguised tax increases and regulatory policy changes. I have criticized this form of lawsuit abuse, that is, governmental lawsuit abuse, on numerous occasions.[1] I want today to predict that we have seen the crest of this particular wave; that government lawsuit abuse is headed for the dustbin of legal history.

I want to frame my discussion of this wrong-headed form of state government litigation by making one preliminary point about government regulation of business generally. If there's one thing that economic research tells us about regulating business, it is this: It is a difficult thing for government to do well. The traditional—and constitutionally appropriate—mode for government regulation of business is through legislative action, often in concert with the legislature's delegation of power to a regulatory agency. However, the traditional legislative regulation of business is subject to a number of shortcomings that limit its effectiveness and efficiency. For example, it is usually difficult, and in some cases it is impossible, to amass the information necessary for sensible policy making. Further, the legislature or regulatory agency is often the focus of lobbying and other forms of rent-seeking activity on the part of the regulated firms and others trying to influence regulatory policy. The result of legislative regulation of business can be unfortunate for consumers and taxpayers. Government regulation often raises prices and limits consumer choices while generating little or no countervailing public benefits.[2]

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[1] Most of my speeches and essays on this subject are collected in the "speeches and articles" section of the website of my office, http://www.ago.state.al.us. *See also* Bill Pryor, *Curbing Government Lawsuit Abuse*, Intellectual Ammunition (Heartland Institute, Sept.—Oct. 2001), *available at* http://www.heartland.org/ia/sepoct01/cover.htm.

Given the less than sterling record of traditional legislative regulation of business, would regulation through litigation be preferable? The answer is no. For all its flaws, the traditional legislative approach to the regulation of business is better equipped than litigation to develop the necessary information and balance competing private interest group claims en route to the formulation of government policy. As Harvard law professor Kip Viscusi has recently argued, "The policies that result from [regulation through litigation] almost invariably involve less public input and accountability than in the case of [traditional] government regulation."[3] As hard as it is to regulate business through legislative and agency processes, there is nothing gained by shunting these questions into a judicial forum and much to be lost in terms of public participation and the legitimacy of government processes.

The era of state attorneys general activism through regulatory litigation began here, in May of 1994, when the state of Mississippi filed the first state lawsuit against the tobacco industry. The state sought to recoup millions of dollars it claimed to have spent on Medicaid patients who smoked and had smoking-related health problems. I heard Professor McGovern say that states don't smoke, so they don't assume risks. Well, if they don't smoke, they don't get damaged either. Through this lawsuit, the Attorney General of Mississippi sought to achieve certain tax and regulatory outcomes that had not been forthcoming from the Mississippi legislature—namely, an increase in the price of cigarettes to fund the settlement of the state's lawsuit and a series of regulatory restrictions on the marketing of cigarettes.

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[2] See the empirical studies collected in George Stigler, ed., Chicago Studies in Political Economy (1988).

[3] W. Kip Viscusi, The Regulation—Litigation Interaction, AEI—Brookings Joint Center for Regulatory Studies Working Paper No. 01—13 (Oct. 2001), *available at* www.aei.brookings.org/publications/working/working01_13.pdf (last visited Mar. 8, 2002).

Pretty much everyone agrees that the state tobacco lawsuits were unprecedented. The word unprecedented has a lay meaning as well as a more technical meaning for lawyers. I'm using the word in both senses. The suits were of a sort that state attorneys general had never filed before, and they were without any precedential support in Anglo-American law. There's a good reason there was no legal precedent for these cases. The law they sought to establish was horrible public policy, and the common law does not ordinarily promote horrible public policy.

We all know how the tobacco litigation unfolded.[4] Mississippi was joined by other states—slowly at first, but with increasing intensity during 1996-97. And at the end of the story, forty-two states had filed baseless lawsuits against the tobacco industry seeking to gain through settlements the kinds of tax and regulatory outcomes I have just mentioned.

When the industry agreed to settle with all the plaintiff states in November of 1998, it may have looked to the casual observer like a huge victory for the states. The tobacco companies agreed to make multi-million dollar payments to the states essentially in perpetuity. During the first twenty-five years of the settlement, these payments will total approximately a quarter of a trillion dollars. Further, the companies agreed to abide by a series of new regulations concerning the marketing of their products. And finally, the companies agreed to pay billions of dollars in attorneys' fees to the private trial lawyers who represented most of the plaintiff states.

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[4] For a fuller history, see Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 566—70 (2001).

The announcement of the settlement was widely heralded in terms of protecting the public's health and in particular, protecting children's health. A new day was supposed to have dawned in the regulation of cigarettes and smoking, all thanks to this litigation. The reality was and is considerably less noble.

For starters, the tobacco companies almost immediately passed the cost of the settlement on to smokers through increases in the price of cigarettes. Far from punishing the tobacco companies, the settlement put the financial burden on smokers. In this regard, the settlement is indistinguishable from an increase in the excise tax on cigarettes, a quintessentially legislative prerogative.[5] That's irony number one.

Moreover, by virtue of the way the settlement was drafted, it actually protects the market shares of the major cigarette firms from any real challenge they might otherwise face from new startup tobacco firms.[6] Tobacco stocks have soared in a bear market. That's irony number two.

Finally, state legislatures have spent very little of the proceeds of the settlement on public health efforts to cut smoking. Indeed, legislatures have spent and are spending the proceeds of the settlement on a wide range of public needs.[7] That's irony number three. The only unambiguous winners in this scenario are the private attorneys who are reaping billions of dollars in fees for their efforts in the litigation war against big tobacco.[8] There's nothing ironic about that. Tragic or absurd maybe, but not ironic.

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[5] W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 580 (1999).

[6] *See* Robert A. Levy, *The War on Tobacco*, in THE RULE OF LAW IN THE WAKE OF CLINTON 121 (Roger Pilon ed., 2000); Ian Ayres, *Using Tort Settlements to Cartelize*, 34 VAL. U.L. REV. 595 (2000).

[7] One recent study revealed that, during the fiscal years 2000—2002, only five percent of the states' tobacco settlement proceeds (just over $1 billion) is to be spent on smoking prevention programs in forty states. Press Release, National Conference of State Legislatures, Health Programs Benefit from Tobacco Settlement (Aug. 11, 2001), *available at* http//www.ncsl.org/programs/press/2001/pr010811.htm.

In spite of the significant negative fallout from the tobacco litigation, it apparently emboldened some of my fellow state attorneys general to file similarly ambitious and flimsy regulatory lawsuits against firms in four other industries; two for recoupment of healthcare costs, two for other regulatory relief.

In May of 1998, as the settlement talks were underway in tobacco, twenty states joined the U.S. Department of Justice in its antitrust lawsuit against Microsoft, the subject of today's lead editorial in the Wall Street Journal, which begins, "It's time to ask what a horde of state attorneys general are doing in the federal government's Microsoft suit."[9] While this state litigation is not nearly as thin in terms of precedent as the tobacco suits and does not seek any recoupment of third party healthcare costs, I submit that the same hubris surrounded both the tobacco and Microsoft suits. Intoxicated with the prospect of restructuring the tobacco industry, some state attorneys general apparently wanted to try their hand at helping to restructure the nation's computer software industry.

In October of 1999, Rhode Island filed the first true "son-of-tobacco" lawsuit, a healthcare recoupment action against lead paint manufacturers.[10] In June of 2000, the State of New York filed a recoupment suit against firearms manufacturers, similar to dozens of lawsuits filed by local governments.[11] In

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[8] For a spirited discussion of the serious ethical questions raised by these fee arrangements, see Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1150—56, 1181—87 (2001). Legal journalist Walter Olson does an admirable job keeping track of the numerous ongoing disputes concerning the tobacco attorney fees on his Overlawyered.com website, at http://www.overlawyered.com/topics/tobacco.html.

[9] *A Permanent Throne*, WALL ST. J., Nov. 9, 2001, at A14.

[10] The complaint in *Rhode Island v. Lead Industries Assocs., et al.,* C.A. No. 99—5226 (Providence Superior Ct.), is available at http://www.riag.state.ri.us/press/Complaint.htm (last visited Mar. 8, 2002).

[11] Press Release, Office of New York State Attorney General Eliot Spitzer, New York Becomes First State to Sue Gun Companies (June 25, 2000), *available*

September of 2000, Connecticut followed the lead of several high profile tobacco lawyers, including Dickie Scruggs, and sued a number of HMOs. Contrary to the private attorneys' suits, the Connecticut suit seeks injunctive relief and says nothing about monetary damages.[12] Here the Attorney General of Connecticut seeks to impose his will on the entire healthcare industry.

Given the apparent fecundity of the tobacco litigation, many commentators have pointed out that we might expect (or fear) to see future government litigation brought against, for example, makers of alcoholic beverages, fatty foods and automobiles.[13] One commentator recently noted that we face a "substantial danger that state attorneys general and local government officials will regularly succumb to the temptation of the tobacco example and will seek to achieve regulatory and tax outcomes through litigation rather than through normal and constitutionally appropriate legislative channels."[14]

It is both foolish and dangerous to believe that we will get better public policy by substituting litigation for the democratic process. And there seems to be a growing realization that the method of regulation by litigation is deeply flawed, as indicated by three sets of recent developments.

First, there is a growing discussion of possible legislative fixes for this problem. Among these are proposals that would limit or eliminate the ability of state attorneys general to hire outside lawyers to represent the state on a contingent fee basis, the method of choice in the tobacco suits; limit or eliminate the state attorneys general common law and *parens patriae* authority; and impose a federal prohibition on suits by any level of government for indirect harm without the government

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at http://www.oag.state.ny.us/press/2000/jun/jun25a_00.html (last visited Mar. 8, 2002).

[12] Press Release, Connecticut Attorney General's Office, Attorney General Files Class Action Lawsuit Against Connecticut HMOs (Sept. 7, 2000), *available at* http://www.cslib.org/attygenl/press/2000/health/allhmo.htm (last visited Mar. 8, 2002). The complaint is available at http://www.cslib.org/attygenl/health/omni.htm (last visited Mar. 8, 2002).

[13] *See, e.g.*, Bill Pryor, *The Law Is at Risk in Tobacco Suits*, WALL ST. J., Apr. 7, 1997).

[14] DeBow, *supra* note 4, at 565.

being subject to the same laws and rules that would apply to the case, if brought by the citizens on whose behalf the government is suing.[15] In this vein, it is also worth noting that the firearms industry has been able to convince a majority of state legislatures to adopt statutes preempting any regulation by litigation attempt at their expense.

The second cause for my optimism is the skepticism of the courts that have handled or are handling the "son-of-tobacco" lawsuits. For example, the firearms industry has won an impressive string of court victories, the most notable being the Connecticut Supreme Court's recent decision, the first from a state high court, dismissing the City of Bridgeport's firearms recoupment suit.[16] We can hope that this decision is an omen for the ultimate disposition of the State of New York's gun lawsuit and will deter any state attorney general who still might be contemplating the filing of a gun suit.

The Rhode Island lead paint case survived a round a motions to dismiss in April, 2001. However, the trial judge struck five of the State's ten causes of action sending the case forward under the state's theories of public nuisance, violations of state unfair trade practices act, civil conspiracy, unjust enrichment and indemnity.[17] For reasons I explored with respect to the tobacco litigation, I believe that Rhode Island's remaining case is weak and hope that its rocky reception to date will not be lost on my fellow state attorneys general. Connecticut's crusade against the HMO industry has not progressed very far and has also not attracted any other states to date; also a salutary development.

Just this week, half of the states that joined the Microsoft antitrust litigation agreed to abide by the settlement reached between the Department of Justice and the company. The disappointing aspect of this is that the other states, nine in all, are taking the position that they will continue to prosecute the case even after the federal enforcement authorities are done.[18] State attorneys general offices should not attempt to set national competition policy via litigation. The question of the appropriate antitrust response to Microsoft's behavior is much better handled by the Department of Justice which can take a broad, balanced national view of the issue, than by each state's attorney general. So to look on the bright side, half of my Microsoft-hunting colleagues have seen the light, while the other half continue in darkness. Maybe we can hope that this episode will serve as a cautionary tale for future attorneys general.

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[15] For more details of these proposals, see *id.* at 593—96.

[16] Ganim v. Smith & Wesson Corp., 780 A.2d 98 (2002).

[17] The trial judge struck the state's strict liability, negligence and misrepresentation claims as "too derivative, remote, or contingent." The judge's ruling is available at http://www.courts.state.ri.us/superior/pdf/99—5226.PDF (last visited Mar. 8, 2002).

Third and finally, I think there is a growing realization that the state tobacco litigation was very beneficial for a handful of very inventive lawyers, but for no one else. And it has proved not to be the magic bullet to reduce smoking that some had hoped. In actuality, cigarette consumption per capita in the United States has been in decline for roughly twenty years, falling some forty percent since 1980.[19] The rates of smoking among teenagers has followed a more complicated path, falling sharply from 1976 to 1981, remaining constant for roughly a decade, rising rapidly in the early 1990s, peaking in the middle of the decade and falling since.[20] Much as I'd like to see youth smoking rates fall even further, I do not expect that this will result from litigation or court orders.

The elected representatives of the public have the constitutional responsibility for tax and regulatory policy. The attorneys general should not attempt to subvert this order through the use of novel legal theories and extortionate lawsuits. With any luck at all, more and more citizens will see this clearly and demand that their legislators and their attorneys general see it that way as well. In fact, while Virginia broke its string of electing Republican governors the other day, you might notice that the attorneys general race turned out quite the opposite. The Democratic nominee for attorney general—a trial lawyer—was the one statewide nominee who not only lost but lost by twenty points, sixty to forty. The Virginia outcome resulted, in part, from the formation of a new group, of which I'm chair, the Republican Attorneys General Association.

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[18] John R. Wilke, *Nine States Rebuff U.S.—Microsoft Accord*, WALL ST. J., Nov. 7, 2001, at A3. The nine settling states are Illinois, Kentucky, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio and Wisconsin. The nine non—settling states are California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah and West Virginia.

[19] Jonathan Gruber, *Tobacco at the Crossroads: The Past and Future of Smoking Regulation in the United States*, J. ECON. PERSP., Spring 2001, at 193, 193, 195 fig. 1.

[20] *Id.* at 195, 196 fig. 2.

This reaction to regulation through litigation will, I hope, give my fellow state attorneys general the chance to rethink their role in state government and to sober up after the heady days of the tobacco crusade. While legislative action would help limit the future pursuit of regulation through litigation, some serious soul-searching on the part of state attorneys general is probably also necessary to stem this development. Thank you.

MR. RYCHLAK: We don't have a panel, but we do have one person who can answer questions up here, so if there are questions anyone has. (Pause.) I'm a law professor; I'll start calling on people.

REGULATION MASQUERADING AS JUDGMENT: CHAOS MASQUERADING AS TORT LAW

Michael I. Krauss[*]

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This article is dedicated to the memory of Barbara Olson, a wonderful person and a campaigner for a return to sanity in Tort law. Barbara was killed by enemies of our country on September 11, 2001. She is not forgotten.

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I. INTRODUCTION

I hope at least some readers haven't yet seen this lawyers' joke:

A surgeon, an architect and a lawyer are having a heated barroom discussion concerning which of their professions is actually the oldest.

The surgeon says: "Surgery is surely the oldest profession. God took a rib from Adam to create Eve, and you can't go back further than that!"

The architect responds: "Yes you can! In fact, God was the first architect when He created the world out of chaos in seven days, and you *surely* can't go back any further than THAT!"

The lawyer puffs his cigar calmly and says: "Gentlemen, Gentlemen . . . who do you think created the CHAOS?!!"

The most striking recent development in American tort law is surely the phenomenon of government "regulatory" suits. The tobacco lawsuits launched by the state and federal governments to recover social expenditures "caused" by smoking have consumed prodigious amounts of ink.[1] To a lesser extent, city and county suits against firearm manufacturers and the very recent demands made on lead paint manufacturers have also caught the public eye.[2] Many view the act of holding corporations liable in tort to pay the "social costs" related to their products as the appropriate response to "failed" legislative and regulatory processes.[3]

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[1] A Westlaw search conducted on March 4, 2002 returned over 2100 news stories concerning tobacco lawsuits.

My contention is that when tort suits try to accomplish regulation, they contribute to legal and constitutional chaos. In particular, government lawyers suing corporations in tort, as a solution to perceived "social problems," are subverting our legal institutions and the rule of law.

For some readers, the previous sentence may seem a contradiction in terms. One might think that government creates all law—so how can government suits violate the rule of law? Isn't one of the government's jobs to root out and repress maleficent behavior? Don't the recent lawsuits against tobacco companies, firearm makers, paint manufacturers and the like serve that very purpose? And courts will dismiss the lawsuits if they are ill-founded, won't they? So what harm can their filing cause?

This article will attempt to show that government behavior can indeed be inimical to the rule of law. The recent "recoupment" suits are not merely destructive of the tort law they profess to apply—they are injurious to our entire legal structure. From the Civil War to the Civil Rights revolution, American society has weathered several existential crises of constitutional law. Former Attorney General Janet Reno and her state and municipal counterparts, however, provoked what may be our first fundamental crisis in tort law.[4] They attempted to transmute tort, a fundamental common-law bastion of our liberties. Our legal system's rejection of this mutation is critical to the preservation of these liberties.

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[2] A Westlaw search conducted on March 4, 2002 returned 258 news stories concerning lead paint poisoning lawsuits.

[3] *See, e.g.*, Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 31-40 (1979). "Failed" here seems to imply that a legislative decision to impose such costs on manufacturers would evidence a "successful" legislative process, while any other decision would be a "failure.".

[4] In the mid- to late 1960s, some felt that the advent of strict liability in the context of products liability cases was a great legal crisis. *See, e.g.*, William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791-94 (1966). However, I don't believe this to be so, for strict liability was not a real change. *See* Gary T. Schwartz, *The Nature of the New*

To understand the gravity of this unprecedented attack on tort law, it's important to grasp how tort law fits in the legal order of a society of free and responsible individuals. To see this, one must understand the differences between two basic types of legal rules in a free society: rules of *private ordering* and of public ordering.

Part I of this article will briefly describe these differences, then situate tort law as an intrinsic component of private ordering. The article then examines government regulatory litigation. It focuses on the municipal and federal firearm litigation, on the state and federal tobacco lawsuits, and on recent cases involving lead paint. The article examines the bases for these suits, and shows how they denature tort law. It canvasses the effect of this abuse on our legal structure. In closing, the article briefly suggests what we can and should do to revive tort and the rule of law.

II. PRIVATE ORDERING V. PUBLIC ORDERING

Public law, regulating relationships between citizens and the state, is all the rage. Constitutional litigation makes headlines, as it should.[5] Criminal trials are often appropriate front-page fodder. It is curious, though, that in a free society like ours private law issues are not more widely recognized as vital.[6] For private law (roughly, rules regulating the allocation of rights and obligations among citizens) and private ordering (the possibility for people to self-determine their rights through private law) are arguably what distinguishes free societies from totalitarian ones.[7] All countries have public

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Restatement, 8 KAN. J.L. & PUB. POL'Y 43 (1998).

[5] *See* Claudia MacLachlan, *Doing Well v. Doing Good: Students Are Increasingly Tempted to Forgo Public Service for Law Firm Salaries*, LEGAL TIMES, Sept. 4, 2000, at 50; Robert Schmidt, *Nonprofits Battle Each Other for Bucks*, LEGAL TIMES, July 17, 1995, at 8.

[6] *But see, e.g.*, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).

[7] *See, e.g.*, F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); BRUNO LEONI,

law institutions. But only in free countries does private law dominate the acquisition and exchange of rights. Private law does this by allowing citizens to transfer entitlements (i.e., to assume risks) voluntarily through contract law, and involuntarily for two reasons: when one's choices wrongfully cause harm to another (tort law), and when blood or other family ties impose obligations.

Tort law, which assigns private obligations to wrongdoers who cause harm, is an essential component of private ordering. What is the essence of tort law?[8] This important question is perhaps best broached by sketching what tort is *not*:

Tort is not indirect insurance. Tort law simply does not exist in order to provide insurance against risks. Free societies have a very "thick" (competitive) contractual market for insurance policies that do just that.[9] If an insured party is the victim of a tort, she may nonetheless recover from the tortfeasor (unless, of course she has transferred her tort entitlement to her insurer).[10] If social insurance is the desired goal (i.e., redistribution, or free insurance provided to some at the expense

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FREEDOM AND THE LAW (1961).

[8] *See* ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1995); Michael I. Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U. L.J. 623, 625-27 (1991).

[9] Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177 (1990); Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820, 820-45 (1995).

[10] *See, e.g.*, Harding v. Town of Townshend, 43 Vt. 536 (1871) (holding defendant is not entitled to have deducted the amount received by the plaintiff from an insurance company on account of the injuries for which he claims to recover against the town); Clark v. Wilson, 103 Mass. 219, 227 (Mass. 1869) (stating payment of a loss by insurers does not defeat a right of action by the assured against a third person whose fault caused the loss); Perrott v. Shearer, 17 Mich. 48, 56 (Mich. 1868) (holding trespass sustained after plaintiff had recovered from insurance company full value of goods destroyed by fire); *see also* Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970) (applying collateral source rule in motorcycle accident case); Ill. Cent. R.R. Co. v. Hicklin, 115 S.W. 752 (Ky. 1909) (applying collateral source rule); Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 936 (Tex. 1980), *rev'g* Am. Transfer & Storage Co. v. Brown, 584 S.W.2d 284 (Tex. 1979) (applying collateral source rule in action under the Deceptive Trade Practices Act); Johnson v. Kellam, 175 S.E. 634, 636-37 (Va. 1934). *But see* Haynes v. Yale-New Haven Hosp., 699 A.2d 964, 967 (Conn. 1997) (holding underinsured motorist benefits governed by rule precluding double recovery, rather than by collateral source rule, despite contractual aspect of benefits).

of others), then public law, not tort, is the appropriate vehicle for its achievement.

Tort does not exist to compensate victims. Many innocent people suffer losses for which there is no tort recovery. Indeed, the vast majority of good people to whom bad things happen have no recourse in tort. The pedestrian struck by lightning, the merchant who loses everything she owns to a more efficient business competitor; the baby born with a congenital birth defect, the unintelligent or unattractive; and many, many others, find no solace in tort law.

Tort's essence is not the compensation of "casualties," although, of course, tort does compensate some innocent victims in certain circumstances. Rather, the essence of tort law is to reallocate risks when one person has *wrongfully* and *without consent* caused harm to another.[11] It is of the essence of private ordering that tort be properly subjugated to the contractual transfer of risks. If I assume a risk voluntarily, I cannot sue my contract partner in tort if the risk materializes. If I purchase a home in a one-industry town, then blame my seller ten years later after the factory has shut down and my house has lost value, I will have no claim in tort. Nor will I have a contract claim unless my seller has committed some wrong that vitiates the contract. Taking a seat as a passenger in a car one knows is being driven by a drunk driver is a different kind of implied contractual assumption of risk.[12] When a victim expressly or implicitly assumes a risk of loss, tort declines to shift the risk elsewhere. Tort law regulates interaction through *private* ordering. Tort suits are adjustments of risks between private parties. They are very different from public legislation, criminal and regulatory, in several important ways:

- Significantly, tort law happens without state intervention. Government is not a party to a tort suit—unless of course, the government (perhaps through one of its employees) has committed a tort, or has suffered wrongful damage in its private capacity (as when a motorist negligently runs into government property).

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[11] *See* Ernest Weinrib, *The Special Morality of Tort Law*, 35 MCGILL L.J. 541 (1990).

[12] *See* Wright v. Tate, 156 S.E.2d 562, 566 (Va. 1967) (discussing contributory negligence).

- Tort law is not about punishment. Criminal adjudication *punishes* the culprit: common law torts require *compensation* only.[13]
- Common law tort suits are not properly concerned with the enactment of "public policy", which is of course a quintessential output of public ordering. Any concerned citizen has the right to intervene in the legislative process that "produces" public policy, but only the parties to a tort suit can intercede in those proceedings. Our legislative process, which guarantees all sides the right to voice their views, is the only constitutional forum for policy-making.

Finally and crucially, tort suits were not designed as, and are totally inappropriate vehicles for, coerced redistribution of resources. Redistribution is the province of tax and welfare law, which are components of public ordering. Coerced transfers through public ordering are often based on conceptions of *distributive* justice.[14] In tort law, however, forced transfers of risks are based on notions of *corrective* justice that have no distributive punch: if a defendant, however poor and pitiful, wrongfully[15] harms a victim, however rich and powerful, compensation is owing in tort.[16]

Just as it is difficult to imagine a free society without the right to hold and to contractually exchange property, free nations have always also had rules of tort liability, transferring property following wrongfully caused private losses. Tort law, in other words, is essential to private ordering. To see this, imagine that tort was replaced by state insurance: i.e., that every loss was deemed a public loss, because government provided massive social protection against all risks. Imagine also that government proceeded to prosecute all who caused "claims" on its resources. In such a society there would be no need for tort law: Government recoupment would proceed from tax and criminal law considerations. There would also be no meaningful contract law in such a world – if all risks are socialized, private individuals could not own property (because to own property is to assume the private risk of its loss). Socialization of risks substitutes public for private ordering; regulations and criminal statutes for contract and tort. Wrongs against persons become offenses against the state. Political processes, not private conduct, would determine who gets entitlements and who loses them. As private ordering recedes in this way, freedom is replaced by collectivism.

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[13] It is true that modern day products liability suits are often characterized by huge *punitive* damages. However, punitive damages are extremely rare in tort adjudication. My own view is that such damages are incompatible with the nature and history of common law tort. That issue is not germane to this essay. For a discussion, see Krauss, *supra* note 8.

[14] *See* Michael J. Graetz, *To Praise the Estate Tax, not to Bury It*, 93 YALE L.J. 259, 274-79 (1983).

[15] Some may object that *strict liability* does not require wrongdoing for tort liability. However, when the term *strict liability* is invoked in products cases, the court is in fact assigning liability for negligence (in defective design cases) or for breach of contract (in defective manufacturing and "failure to warn" cases). *See* James A. Henderson, Jr. and Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 WM. MITCHELL L. REV. 7 (2000); Krauss, *supra* note 8.

[16] Krauss, *supra* note 8; Weinrib, *supra* note 11.

III. THE FIREARMS LAWSUITS

On October 30, 1998, New Orleans became the first city in the nation to file suit against the gun industry,[17] followed two weeks later by Chicago.[18] Within a year, twenty-seven additional cities and counties filed suit against over forty gun manufacturers, dealers and trade associations. On December 7, 1999, the Clinton White House announced that it was preparing a class action suit against firearm manufacturers on behalf of local public housing authorities. The suit would be based upon the same legal theories as the litigation by the twenty nine municipalities.

Most of the governments suing the gun industry contend that firearms are "defective and unreasonably dangerous" products as currently manufactured and marketed. The cities demand damages for harms allegedly caused by those defects.

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[17] Morial v. Smith & Wesson Corp., 2000-1132 (La. 4/3/01), 785 So. 2d 1, 2.

[18] Chicago v. Beretta U.S.A. Corp., No. 98-CH-015596 (Cook County Circuit Court, Chancery Div. Sept. 15, 2000).

So far, so good: this claim, on its face, does not violate established principles of tort law. It alleges that the firearm manufacturers acted wrongfully. The common law has long allowed a victim to sue Coca-Cola, for example, if an exploding and defectively manufactured Coke bottle injures her.[19] But the city governments were not claiming their property was lost or damaged by exploding, defective guns. Rather, they sought to recover medical costs they incurred by treating victims of gun-related violence in city hospitals, by paying for police overtime, and by foregoing tax revenue as property values dropped in crime-ridden neighborhoods.[20]

The impropriety of those damage claims will be dealt with shortly. It's important to note, however, another theory underlying several of the firearm lawsuits (notably, that of the City of Chicago, which was subsequently emulated by other jurisdictions). This is the charge that the firearm industry's negligent *marketing* tactics have created a "public nuisance" which jeopardized Chicagoans' safety. Manufacturers allegedly created this nuisance by legally selling "too many" guns in some areas (e.g., in Illinois, the suburbs of Chicago). The saturation of sales in these areas was such, it is alleged, that manufacturers should have known that some of these weapons would be transported to the City of Chicago.

Many of the cities' suits seek, in addition to damages, complex court orders that do not resemble tort awards at all. For example, Chicago seeks an injunction prohibiting:

- sales to people who have purchased guns in the last thirty days.
- sales in excess of "lawful demand"; and
- sales of "firearms that by their design are unreasonably attractive to criminals."

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[19] Torgeson v. Schultz, 84 N.E. 956, 957-58 (N.Y. 1908).

[20] The suit by Bridgeport, Connecticut, added a claim that gun manufacturers have violated federally protected civil rights because shootings take place in "predominantly minority neighborhoods." *See* Ganim v. Smith & Wesson Corp., 780 A.2d 98, 109 (Conn. 2001). Eighty percent of homicide victims in Bridgeport are in fact members of "minority groups." *Ganim*, 780 A.2d at 109. Bridgeport does not mention that ninety percent of homicide defendants are also minority group members.

Plaintiffs often ask that defendants be commanded to obey existing laws. But no existing laws contain any of the requirements that Chicago seeks. This award, if granted, would amount to a criminal gun control statute enacted by the courts. This is public ordering – a first sign that the cities' lawsuits are an abuse of tort law.

A. *The Legal Flaws of the Firearms Suits*

As stated above, the most common claim in the firearms suits is that the defendants marketed defective products. How are the manufacturers' firearms alleged to be defective?[21] Is it averred that they misfire, or fire inaccurately? Not at all. Rather, these lawsuits claim the defendants' guns are defective because criminals can use them.

It turns out that the "defective firearm" suits contain so many of their own serious legal defects that they constitute a travesty of tort law. Mindful of the fact that a tort suit involves a claim that a defendant *wrongfully caused damages* to an innocent victim, these defects can be explored sequentially.

1. No Damages

The most serious defect relates to plaintiffs' entitlement to any damages, even assuming for a moment that some wrongful behavior or harm is attributable to the defendants. To recall, not one of the plaintiff cities argues that its property was hit by gunfire. Rather, the cities contend that they incur losses and sacrifice income when *others* are harmed by gunfire.

Unfortunately for this claim, no one but the direct victim of damage, or his assignee, may recover in a tort suit. Suppose that Abner carelessly drives his car, injuring Bobby. Suppose further that Charlie had contractually promised to compensate Bobby if Bobby was ever injured for any reason. So Charlie pays off Bobby's losses and then sues Abner to obtain reimbursement. Charlie's suit is the claim of a subrogated insurer seeking indemnity. Charlie must have acquired the rights of the direct victim through a *subrogation* clause in the insurance contract, or Charlie must be legally subrogated by statute if he is to seek reimbursement. In that case, Charlie's claim against Abner will have all the strengths and all the weaknesses of Bobby's lawsuit. If Abner has a good defense against Bobby, that defense will prevail against Charlie. For example, if Abner did not wrongfully harm Bobby, Charlie's suit against Abner will fail. Similarly, if Abner could invoke "assumption of risk" against Bobby (imagine that Bobby and Abner had gone drinking together, and that Bobby had knowingly taken a seat in a drunken Abner's car), then Charlie's claim will fail.

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[21] A product must be defective if a direct victim is to have a tort cause of action against its manufacturer. The victim must do more than establish that the product was dangerous because manufacturing a dangerous but legal product, like gasoline, knives or guns, is not a wrongful thing to do.

Now suppose the law is clear that Bobby has no tort suit against Abner, but that Charlie nonetheless claims he somehow still may successfully sue Abner. Charlie is making a kind of demand that tort law has never recognized in 250 years of common law adjudication. Charlie is claiming that as an insurer, he has acquired more rights than his insured possessed.

The rule against indirect recovery is a fundamental part of tort law. When a tortfeasor injures someone, whether in a car accident or a shooting, hundreds of people and companies in addition to the injured party will suffer. Strangers live in fear they might become victims one day. Employers of the victim may be unable to fully replace a productive worker. Friends may lose the value of the injured person's fellowship. Governments will be deprived of income tax the victim would have paid. And the corner dry cleaners will lose the profit on the suit she would have had pressed. Yet only the direct victim (and her insurer if subrogated) can sue in tort.[22] Moreover, these direct victims have rights only against the person who wrongfully shot the victim. They have no claim against those who made the firearm.

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[22] A limited common law exception allows spouses of direct victims to sue for "loss of consortium" when deprived of the company of the victim. The fact that this exception was carved out by the common law is an eloquent illustration of the basic rule against recovery for indirect damages.

Without exception, direct suits by gunshot victims against firearm makers have been spectacularly unsuccessful unless the shooting was the result of a defect in the firearm, or unless the manufacturer in some way conspired with the shooter.[23] Accordingly, cities in their capacity as "insurers" of shooting victims have suffered no damages recoverable from firearm manufacturers.

The cities' claim for indirect damage flies in the face of fundamental principles and of modern tort law. In 1998, in *Seafarers Welfare Plan v. Philip Morris*,[24] a federal court held that the "longstanding rule [against recovery for indirect harm] bars the Plaintiffs' claims in this case, notwithstanding Plaintiffs' artful recharacterization of them" as direct.[25] And in *City of Flagstaff v. Atchison, Topeka & Santa Fe Railway Co.*,[26] a municipality was not allowed to recover the costs of evacuating its residents following a derailment, even though the railroad was at fault. The court stated:

> If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.[27]

2. No Proximate Causation

The damage issue alone constitutes a fatal flaw in the government suits against gun manufacturers. Even if gun manufacturers proximately caused damage to *someone*, they did not proximately cause damage to the plaintiffs.

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[23] *See* Merrill v. Navegar, 28 P.3d 116 (Cal. 2001); *see also infra* note 33 and accompanying text.

[24] 27 F. Supp. 2d at 630.

[25] *Seafarers Welfare Plan*, 27 F. Supp. 2d at 630. Similarly, see Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957 (9th Cir. 1999); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 918 (2d Cir. 1999) (dismissing a suit by a union health plan).

[26] 719 F.2d 322 (9th Cir. 1983).

[27] *City of Flagstaff*, 719 F.2d at 324.

But the cities' proceedings fail the next requirement of tort suits as well. The firearms manufacturers proximately caused harm to *no one.* Courts have uniformly held that the manufacture and sale of firearms does not proximately cause any criminal shootings. Rather, the free and deliberate choice of a shooter to wrongfully use a firearm is the proximate cause of the criminal act.

Even if tort law sought out (and it does *not* do so) remote as opposed to proximate causes of gunfire, welfare dependence, poor education and fatherless homes are much better predictors of violent behavior than are the sale and purchase of firearms. Firearms have for decades been present in about fifty percent of all American homes, the overwhelming majority of which have no involvement with violent assaults.[28] And the plaintiff cities must surely agree with the preceding: virtually all of them reduce the cost of buying new guns for their police departments by selling off their old guns to dealers whom they know will legally resell them to the general public.

It is true that in 1999, for the first time, an appeals court ruled that proximate causation was present in one *individual* (not city-filed) lawsuit against one firearm manufacturer, Navegar, Inc.[29] But *Merrill v, Navegar* is based on the unique claim that the manufacturer of a particular model of firearm was a joint tortfeasor who intentionally marketed that model to criminals like the man who injured the plaintiff.[30] The cities' lawsuits do not, and could not, make such allegations.

As a general rule, then, the making and the selling of guns are neither moral nor legal causes of crime. In truth, the general use of firearms does not contribute to harm. If causation is sought, firearm ownership is linked to *security*, not to death. Guns are used defensively (merely brandished to prevent assault, rape or robbery) approximately 2.5 million times per year—far greater than the number of firearms crimes. Robust empirical data indicates that laws permitting the carrying of concealed handguns reduce murder by about 7.65 percent and rape by about five percent.[31] Those benefits are real and substantial.

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[28] GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL (1997).

[29] Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *reversed by* 28 P.3d 116 (Cal. 2001). The California Supreme Court ultimately reversed this ruling.

[30] See Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons"*, 8 STAN. L. & POL'Y REV. 41 (1997), for a powerful critique of the *Navegar* case. My point is not that the case is well decided, but merely that, even if it were correct, it would lend no support to the recoupment suits.

Gun ownership facilitates self-defense by allowing physically weak persons to confront stronger aggressors. The "equalizer effect" has historically been associated with increased security and liberty and was explicitly recognized as doing so by defenders of constitutionalism in both England and the United States.[32] Ownership of a firearm, in and of itself, is best seen as insurance against lawless aggression by individuals[33] or (in the Founding Fathers' eyes, and in the eyes of the second Amendment to our Constitution) by the government.[34]

Guns are not primarily owned by criminals. Firearm ownership, for example, is most common between the ages of forty-five and sixty-five[35] while arrest rates for violent crime peak between the ages of fifteen and twenty and decline rapidly after age twenty-five.[36] This is yet another nail in the coffin of the cities' proximate causation argument.

3. No Wrongdoing

To recap so far, cities suffer no cognizable damages from the manufacture and sale of firearms—indeed this manufacture does not as a general matter proximately cause injury to anyone! The cities' recoupment lawsuits cannot establish two (damages and proximate causation) of the three elements needed to prevail in tort.

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[31] John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEG. STUD. 1, 19 (1997).

[32] JOYCE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994).

[33] Samuel Wheeler, *Arms as Insurance*, 13 PUB. AFF. Q. 111 (1999).

[34] MALCOLM, *supra* note 32.

[35] NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL HEALTH INTERVIEW SURVEY (1994 Supplementary Series).

[36] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1997).

But even if guns did damage cities, and even if the causation was proximate, gun manufacturers would *still* not be liable unless they had committed some wrongdoing. People proximately harm others all the time, but are not liable without wrongdoing: just think of the harm competitors inflict on each other. The cities' lawsuits flunk the third test, the need to prove wrongdoing.

4. No Defective Design

Most of the cities' lawsuits allege that the manufacturers' wrongdoing consists of designing a defective product, to wit, the modern handgun. But American case law has routinely rejected claims that handguns are intrinsically defective. Some prominent examples among many, many others:[37]

- In 1989, the Court of Appeals for the District of Columbia held, in *Delahanty v. Hinkley*,[38] the Reagan assassination attempt case, that gun injuries are not the product of defective design or marketing.
- In 1998, a federal court in New York ruled, in *Hamilton v. Accu-tek*,[39] that

> [t]he mere act of manufacturing and selling a handgun does not give rise to liability absent a defect in the manufacture or design of the product itself. . . . [Plaintiff] alleges that handguns are unreasonably dangerous because of the lack of an anti-theft or related safety device. There is no valid basis for this claim.[40]

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[37] For other cases, see *Moore v. R.G. Indus.*, 789 F.2d 1326, 1327 (9th Cir. 1986) (stating that firearms manufacturer was not liable for "Saturday Night Special" because product performed exactly as designed); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985) (holding that guns operate exactly as designed and are therefore not defective); *Rhodes v. R.G. Indus.*, 325 S.E. 2d 465 (Ga. 1984); and *Burkett v. Freedom Arms, Inc.*, 704 P.2d 118 (Or. 1985) (stating that design of guns is not "abnormally dangerous").

[38] 564 A.2d 758, 760 (D.C. 1989).

[39] 935 F. Supp. 1307 (E.D.N.Y. 1996).

[40] *Hamilton*, 935 F. Supp. at 1323-24.

5. No Nuisance

As was noted earlier, Chicago's lawsuit anticipated that her sister cities' claims of "wrongdoing by design" were implausible. Chicago therefore relied on an innovative claim that the manufacturers' wrongdoing lay in their *marketing* of guns. Chicago contends that this marketing creates a "public nuisance" in two different ways. Chicago's brief also alleges that gun stores "flooded" with guns made sales without obtaining adequate "proof" that Chicago-based buyers would keep their guns outside the city and without notifying city police whenever a Chicago resident buys a firearm.[41]

Chicago's nuisance claim is at best imaginative and at worst a flagrant attempt to bypass the legislative process and substitute a judge's or jury's notion of what a gun control statute (an element of public ordering) ought to look like. Indeed, some aspects of Chicago's claim are self-contradictory. For instance, Cook County is co-plaintiff with the City of Chicago. As a home rule unit, the county could have enacted more restrictive gun laws. Cook County's complaint to the court, quite literally, is that it has itself failed to pass appropriate legislation. Cook County's "Reward me in tort because I didn't legislate" plea must be a first in American jurisprudence.

The American Law Institute (ALI), in its authoritative Restatement (2nd) of Torts, defines a public nuisance as "an unreasonable interference with a right common to the general public." Professor David Kairys of Temple University Law School and co-counsel in the Chicago case, has urged the adoption of the public nuisance doctrine in gun cases.[42] But no case can be made that firearm sales generally constitute a public nuisance. Indeed, Kairys has it backwards. It is Chicago's lawsuit and Kairys' argument that constitute a public nuisance under the ALI definition. The sale of guns *promotes* a right common to the general public, for individuals have a right to protect themselves against criminal conduct.

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[41] The city's attorneys overlook the fact that no law requires dealers to obtain such proof or to give such notice.

[42] David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 14 (1998).

Swiss, Fins, New Zealanders and Americans all have similar legal gun ownership rates, but among these countries only the United States has a high murder rate. And fluctuations in our murder rate have not been related to any change in proportionate gun ownership or indeed to any gun control legislation.[43] On the contrary, neighboring Canadian and American communities that are demographically and culturally similar to each other have statistically similar murder rates, even though they have widely differing reported gun ownership rates.[44] Exhaustive empirical work by Yale law professor John Lott has established that liberal "carry laws" (i.e., recognizing the right of non-felons to carry concealed weapons) are associated with a highly significant *decline* in violent crime.[45]

Far from constituting a public nuisance, firearm marketing generates a public good. To see this, consider a seemingly different crime – auto theft. A persuasive argument has been made that a hidden security device such as "Lo-Jack"®[46] should be subsidized by the state, as it benefits users and non-users alike.[47] Unlike buyers of "The Club"® or other visible vehicle protection devices, which procure private protection with no positive public externality,[48] "LoJack" purchasers are helping others when they buy this product. So, according to both historical and current empirical studies, are honest purchasers and carriers of firearms.

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[43] DANIEL POLSBY, FIREARMS AND CRIME (1997).

[44] Brandon Centernall, *Homicide and the Prevalence of Handguns: Canada and the United States, 1976-80*, 134 AM. J. EPIDEMIOLOGY 1245 (1991).

[45] Lott & Mustard, *supra* note 31, at 34-39. Our most permissive gun "carry laws" are in Vermont, which has a very low crime rate.

[46] "Lo-Jack" transmitters are installed in subscribers' cars, in one of hundreds of locations undetectable by thieves. Subscribers' cars are not visibly identified in any way. When a car equipped with "Lo-Jack" is reported stolen, a central switch is set off, transmitting a signal to the local police department. The signal is not audible, and the "Lo-Jack" device is impossible to detect in the car. The recovery rate of stolen "LoJack"-equipped vehicles is extremely high.

[47] Ian Ayers & Steven Levitt, *Measuring Positive Externalities From Unobservable Victim Precaution: An Empirical Analysis of Lojack* 113 Q.J. ECON. 43 (1998).

[48] In fact, "The Club" has a *negative* externality which is explicitly alluded to by its manufacturer in marketing the device: one car's use of The Club makes theft of an adjacent, non-protected car *more* likely. Analogously, visible home security devices (lawn signs for monitoring agencies, iron gates) create negative

The greater the number of "Lo-Jack" devices in an area, the greater the chance that any car in that area is equipped with "Lo-Jack." This "public good" effect gives rise to the temptation to "free ride" on other people's purchases of the "Lo-Jack," with the result that an inefficiently low number of sales of "Lo-Jack" will occur unless each sale is subsidized. Such a subsidy is justified by the public benefit "Lo-Jack" procures. Analogously, the concealed possession and bearing of arms is a "public good," in that it dissuades attacks on arms-bearers and non-bearers alike by increasing the likelihood that a prospective attacker will encounter armed resistance.[49] Under this reasoning, the manufacture and distribution of arms should (as a matter of public tax policy, however—*not* as a matter of tort law) be subsidized by the state, not penalized as a nuisance.

Since empirical data does suggest that, both historically and at present, the existence of weapons procures a public good,[50] their production is the *opposite* of a nuisance. The argument that there are "too many guns" is, pardon the pun, shot full of holes.

So is the argument that the guns that are being marketed are so casually distributed as to constitute a nuisance. The manufacture, sale and ownership of handguns are all highly regulated by public law. The Bureau of Alcohol, Tobacco and Firearms (BATF) licenses all manufacturers. Statutes ban certain guns. It's a federal crime for felons or drug users to purchase or possess any firearm. It's illegal for retailers to sell handguns to minors. Sales of more than one firearm to one individual must be reported to federal authorities. Background

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externalities for neighbors who do not have such devices. Possession of a hidden firearm, however, is possible in any house as long as ownership is legal.

[49] Don B. Kates, Jr., *The Value of Civilian Arms Possession As Deterrent to Crime or Defense Against Crime*, 18 AM. J. CRIM. L. 113 (1991).

[50] Border counties in states that enact right-to-carry laws have reduced violent crime rates. Border counties in neighboring states without such laws see increased crime rates, despite presumably having similar demographics. *See infra* note 30.

checks of all purchasers are federally mandated. Handguns are the only consumer products for which manufacturers, wholesalers and retailers are all required to have federal licenses. Handguns are also the only products that may not be purchased outside one's state of residence. The design of every new model must be inspected and approved in advance by BATF. Anti-gun zealots note that one Maryland jury once characterized the sale of inexpensive handguns (pejoratively called "Saturday Night Specials") as a nuisance because those guns were found to be "destined for criminal use."[51] The evidence indicated, however, that only 1/2 of 1 percent of Saturday night specials are ever involved in a crime. The Maryland tort ruling was nullified by subsequent legislation. In any case, plaintiff cities are suing many gun makers, not just the manufacturers of Saturday night specials.

Proponents of gun control compare firearm sales to trade in marijuana, which some courts have in fact characterized as a "nuisance." Whatever the merits of that characterization, guns, but not marijuana, are indisputably legal products.

Economic logic ultimately provides one more compelling reason to reject the "public nuisance" claim. If gun makers reduce the supply of firearms sold to suburban dealers as Chicago wishes, then the market price of guns will rise. Consumers with the most "elastic" demand—that is, consumers who are most sensitive to price changes—will be the ones who reduce or eliminate their purchases. The evidence is clear: the most price-sensitive consumers are law-abiding citizens. By contrast, criminal demand for guns is highly "inelastic": this is the reason why crooks are willing to pay inflated black-market prices for firearms. Perversely, by restricting the legal supply of guns and thereby raising their price, a successful Chicago lawsuit would put a relatively greater percentage of the nation's weapons in criminals' hands and a smaller percentage in the hands of honest citizens. This would produce exactly the opposite effect from the public-good effect mentioned earlier. In Maryland, for example, where "Saturday Night Specials" may no longer be legally sold, criminals arguably have more confidence that potential victims in poor neighborhoods have been priced out of the defensive handgun market. Despite virtually identical climate, demographics and culture, Maryland's violent crime rate is *three times* that of "right to carry" Virginia, and most victims of violent crime in Maryland are poor and unarmed.[52]

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[51] Kelley v R.G. Indus., Inc., 497 A.2d 1143, 1158-59 (Md. 1985) (superseded by legislation).

Note, finally, that any coordinated industry response to a public nuisance claim would surely run afoul of federal antitrust laws. Manufacturers that "overproduce" would have to collude in order to jointly reduce production. Because brands are more or less interchangeable, no single gun maker would agree to cut back production for fear that other manufacturers would take up the slack. As we will see below, an illegal cartel (benefiting government and industry, and hurting only consumers) is exactly what the tobacco recoupment suits have produced.

Chicago's sorry nuisance argument cannot be allowed to stand. Its implications for private ordering are simply intolerable. Is General Motors liable because the market for cars is "saturated" in Southern California, resulting in traffic jams and accidents? Of course not: rather, it's the case that individual motorists bear the burden of their consumption choices (where to live, what to drive, how to get to work), and are constrained only by their obligation to take due care in using the automobiles they voluntarily acquire. The extent of highway development is a public policy issue, not a tort issue.

When a state judge asks a state jury in a tort case to determine whether their state has too many cars, or too many knives or guns, this judge is asking the jury to engage in public ordering totally outside its constitutional jurisdiction. When that judge permits a claim that *neighboring states* allow too many gun sales,[53] he or she is contravening principles of federalism. Never before in our country's history have tort tribunals been asked to interfere so extensively in the legislative process, and never before has individual responsibility been so challenged by a tort suit.

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[52] *See* Michael D. Shear & Brooke A. Masters, *Two Counties: A Dangerous Difference; While Montgomery's Crime Rate Has Risen, Fairfax's Is Down*, THE WASHINGTON POST, Apr. 6, 1998 (analyzing FBI violent crime statistics and finding that while Fairfax County, Virginia's crime rate had dropped 36 percent from 1977 to 1997, adjoining Montgomery County, Maryland's violent crime rate had risen 43 percent over the same period.). The two counties have virtually identical demographics, but since 1998, Fairfax County residents have been allowed to carry concealed weapons.

6. No False Advertising

One final allegation of wrongdoing is worth mentioning, as it relies on "junk science" of the first order. Several cities' suits claim that gun manufacturers' wrongdoing consists of falsely advertising that their products are useful for personal safety, whereas (the cities allege) the opposite is in fact true. This allegation typically refers to a 1993 article in the *New England Journal of Medicine (NEJM)* which concluded that the presence of a gun in one's home increased the chances of a violent death.[54] As discussed above, substantial objective evidence indicates that gun ownership, socially, is associated with a reduction in criminal behavior. How can these two sets of studies co-exist?

An appalling selection bias fatally flaws the Kellermann study. As has been pointed out by others,[55] the study is both over- and under-inclusive. The study consisted of going to homes where a homicide occurred and asking whether there was a gun in the house. Such a study excludes successful uses of a gun (i.e., where the attacker is scared off and no one is killed). Only persons who were killed and who owned guns are included. And even if the homicide victim was someone who did not live in the house, and who was stabbed to death, the answer "yes" to the question "was there a gun in the house?"

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[53] The San Francisco suit alleges that some guns used in San Francisco crimes were purchased in Nevada and Arizona, which are oversupplied because they have "weak gun control laws." In essence the attorney for the city of San Francisco is asking that corporations be held liable because they abided by other states' valid legislation.

[54] Arthur Kellerman et al., *Gun Ownership As a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084 (1993).

[55] *See, e.g.*, Lawrence Southwick, Are Guns Really a Risk Factor for Homicide in the Home? (1994) (unpublished manuscript, on file with author).

would result in a correlation between guns and homicide. Justifiable homicides would be tarred with the same brush. Thus, Kellermann simply cannot establish his purported conclusion that gun ownership is dangerous.

Moreover, the risk of confounding variables explaining the deaths enumerated in the Kellermann study is tremendous. For example, the fear of being killed may contribute to one's decision to purchase a firearm: if the fear is well founded, we would *expect* firearm owners to be more likely victims of murder than non-owners. But that would not establish that their firearm ownership *caused* the crime. Rather, the causation would be the reverse.

Finally, social statification can easily pollute the results. Consider a population composed of a small subgroup with a high risk of homicide and a high gun ownership rate. This subgroup is composed of career criminals, gang members and others who have a repeated history of criminal activity. The majority subgroup has a much lower risk of homicide and also a lower gun ownership rate. The majority is the general law-abiding population. There is no causal relationship between gun ownership and homicide in either subgroup. However, when we put the two groups together into the single population, an association between gun ownership and homicide appears. This is *not* due to gun ownership having a causal effect but rather to the confounding variable of subgroup membership.[56]

B. Postscript on Gun-Related Violence

None of the preceding disputes the view that gun-related violence is deplorable, as are all preventable injuries—especially those that victimize innocent youngsters. That said, some media and politicians have exaggerated the problem of gun-related violence. Emerging evidence increasingly indicates that homicides by firearm are positively correlated to fallout from the "war on drugs," whereas widespread gun ownership in and of itself *lowers* the homicide rate. In 1996 (the latest year for which I have seen data) there were 1400 accidental gun deaths in the United States. Two hundred involved kids under the age of fifteen; most of those deaths were suicides, however, (the *NEJM* study itself concedes that over 85% of deaths from one's own firearm are suicides) and presumably some suicide victims would have taken their lives by other means.[57] Many other accidental firearm deaths were hunting accidents. Hunting mishaps and suicides aside, guns resulted in the accidental deaths of twenty-one children under age fifteen in 1996.[58] By comparison, each year 2900 children die in car accidents, 950 drown and over 1000 die in residential fires. A child under fifteen is 700% more likely to drown in an unattended private swimming pool or in a bathtub than to be killed by a handgun.[59]

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[56] Don Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 545 (1995).

No one "needs" a pool or a bathtub (we could all use showers or lifeguard-equipped community pools), and neither pools nor bathtubs prevent crimes or preserve liberty. Does that make these consumer devices nuisances? Does that entitle juries in tort suits to determine that too many pools are being installed? Tragic as accidental shootings of children are, they are no more tragic—and are less numerous—than are (for example) deaths of children who are poisoned by ingesting iron supplements prescribed for their mothers. Annually, handgun accidents kill only about half as many children under age five as does the ingestion of household poisons (roach spray, lighter fluid, ant poison, etc.).[60]

To discourage gun ownership by honest citizens is to exacerbate the problem of crime. Even if such an unwise policy were to be adopted, this must not result from an individual tort suit, where the public interest cannot be effectively represented. Public policy regarding guns must result from public ordering—i.e., the legislative process.

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[57] Suicide rates seem independent of gun ownership: Japan, with virtually no gun ownership, has a high suicide rate, while Israel and New Zealand, with high gun ownership, have low suicide rates.

[58] John R. Lott, Jr. & John E. Whittley, *Safe Storage Gun Laws: Accidental Deaths, Suicide and Crime*, 44 J. L. & ECON. 659 (2001).

[59] NAT'L SAFETY COUNCIL, INJURY FACTS 16-17 (1999).

[60] *Compare id.* at 16-17 (nine accidental handgun deaths for young children in 1996), *with Iron Pills Lead List in Killing the Young*, N.Y. TIMES, June 9, 1992.

C. Conclusion

The cases against gun manufacturers are a parody of tort law. As of this writing, the suits in Cincinnati's and Bridgeport's and a large part of the Chicago case, have been dismissed with prejudice. "The city's Complaint is an improper attempt to have this Court substitute its judgment for that of the legislature," wrote the judge who dismissed Cincinnati's case. "Moreover, the City's request that this court abate or enjoin the defendants' lawful sale and distribution of their products outside the City of Cincinnati exceeds the scope of its municipal powers and, to the extent it asks this court to regulate commercial conduct lawful in other states, violates the Commerce Clause of the United States Constitution." Fifteen states enacted bans on municipal firearm lawsuits in 1999: another fifteen hopped on this bandwagon in 2000. And the federal government has withdrawn its own suit against Smith & Wesson and obtained nonsuits against that firm from all cities and counties, in return for commitments (notably, to bundle its guns with trigger-locks) and to refuse to sell to dealers whose sold guns were used in a "disproportionate number" of crimes. These pathetic "concessions" by Smith & Wesson were clearly face-saving devices for the Clinton administration. It knew its lawsuit had no legal merit.

If the municipal and county lawsuits are being dismissed and the federal suit has melted away, how can firearm litigation be a threat to the rule of law? The answer is that several factors combine to transform concededly weak legal cases into effective means of accomplishing a shakedown. Those factors include our use of juries in civil cases, the sheer size of potential damage awards and the perverse incentives that drive lawsuits when public officials hire private attorneys on a contingent fee basis.

Alone among Western democracies, the United States still provides for juries in civil cases. Whatever the merits of civil juries, they are undoubtedly a costly practice when the law becomes "loose."[61] Juries more than judges are willing to overlook legal requirements (assuming jurors understand them . . .), especially when a local injured plaintiff seeks damages from an out-of-state corporate defendant. Not only are plaintiffs more likely to prevail if a jury hears their case, but they are likely to recover a greater sum when juries evaluate their damages. This characteristic of jury trials is surely exacerbated when governments are tort plaintiffs – after all, jurors can reduce their taxes by holding defendants liable for public outlays![62] This incredible conflict of interest is an inevitable product of the conflation of private and public ordering. Its effect is to make defendants more amenable to settlement.

Procedural rules also push defendants toward settlement, even when they have a strong case on the merits. In many jurisdictions, judges are reluctant to dismiss a case prior to far-reaching discovery. Thus, plaintiffs can engage in lengthy and costly "fishing expeditions" for documents or other evidence that might support their case or embarrass defendants in other ways. Even after discovery is complete, a case typically will not be dismissed without trial if there is any conceivable factual dispute over a significant issue.

Yet another intimidating factor for tort defendants is the potentially enormous damage award that could follow an adverse verdict in a recoupment suit. While a defendant might risk going to trial against one private claimant making a radical legal claim, the stakes are much higher when government is the claimant and the litigation is converted effectively into a gigantic class action. Responsible CEO's may be loath to "bet the company" on one tort case if the government is offering a settlement that will allow the company to survive. Indeed, when the federal government recently announced that it planned to join the lawsuit against firearm manufacturers, it virtually conceded that it had no desire to see the legal merits of its case debated before a court of appeals. Rather, HUD Secretary Cuomo frankly admitted that he hoped the mere prospect of facing off against unlimited resources of the federal government would lead the defendants to settle.[63] Thus does public ordering submerge a common law private ordering system. Thus are substantive rules of tort law perverted by the presence of government plaintiffs.

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[61] STEPHEN J. ADLER, THE JURY: TRIAL AND ORDER IN THE AMERICAN COURTROOM (1994).

[62] Los Angeles Mayor Riordan has proposed that his city's proceeds from the tobacco recoupment suit, to be discussed *infra*, go to pay victims deliberately injured by his city's police officers. *See* Robert Jablon, *Mayor: Pay Suits with Tobacco Funds*, ASSOCIATED PRESS WIRE SERVICE, Feb. 17, 2000, *available at* 2000 WL 14321362. The message to prospective jurors is clear: find corporations to pay for public outlays, or you will pay for them yourselves.

Finally, firearm makers and other industries have reason to be concerned about the unholy alliance between government and the plaintiffs' bar. Although the gun suits are based on different legal theories than the tobacco suits, they enjoy a common lineage. Both series of suits were concocted by a handful of private attorneys who entered into contingency fee contracts with public officials. In effect, members of the private bar have been hired as government subcontractors but with a huge financial interest in the outcome. Imagine a state attorney general corralling criminals on a contingency basis or private state troopers paid a commission for every traffic stop. The potential for corruption is enormous.

IV. THE TOBACCO LAWSUITS

Unlike firearms, tobacco availability is not associated with political freedom and personal safety. The tobacco litigation is nevertheless a poster child for the claim that tort law, an essential component of private ordering, is dying.

In 1998, the major United States tobacco companies signed a widely publicized "Multistate Agreement" with the attorneys general of forty-six states that had sued the companies for public outlays allegedly caused by their fraudulent concealment of the dangers of smoking. Under this agreement, the tobacco companies have promised to pay the states nearly $250 billion over twenty-five years.[64] Attorney General Reno recently launched a similar suit to recoup hundreds of billions more in federal damages. But the common denominator for both cases, the claim that the tobacco producers have injured governments, is simply false. And both the states' claims and the recent federal litigation are unconstitutional to boot.

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[63] In an interesting parallel situation, health care companies have been settling what they consider to be typically bogus Medicare suits because of the potential for bankruptcy (or its equivalent—exclusion from the Medicare program) if they are found liable. The Secretary of Health and Human Services and the Department of Justice recently issued guidelines limiting False Claims Act suits because of industry claims that they were brought merely to coerce settlements. *See, e.g.*, Peter Aronson, *Health Law Boom: DOJ's Fraud Crusade Has Boosted Health Care Lawyer Numbers*, NAT'L L.J., May 17, 1999 at A1. How ironic that the government is party to the same abuse of the legal process here.

A. *The Illusory Underpinnings of the State and Federal Lawsuits*

1. No Direct Government Damages

Apropos the firearm litigation, this policy report has already listed the prerequisites of a successful tort suit. If this checklist is used to evaluate the tobacco litigation, it becomes patently obvious that (with apologies to Oakland and Gertrude Stein) "there's no 'there' there."

Virtually every serious expert who has studied the cost of smoking has concluded that smoking does not cause *any* economic loss to government. This is because smoking affects the timing of state-provided health care costs, not the total amount of those costs. Because smokers die earlier on average than nonsmokers, other things held equal, the costs paid by government to treat tobacco-caused diseases are more than offset by savings to government retirement and health systems. One estimate sees states *saving* thirty-two cents in health costs for every pack of tobacco sold.[65] Even the anti-tobacco *New England Journal of Medicine* has concluded that tobacco is a money*maker* for government, not a money loser.[66] Tobacco revenues go to pay for general government programs above and beyond paying for tobacco-caused illness. The government has a definite financial interest in Americans' continued smoking. In fact, government takes in much more from our smoking than do tobacco companies. Of the $4.00 average price (as of January 1, 2000) of a pack of Marlboros in New York City, $2.11 goes to various levels of government while only twenty-eight cents goes to Philip Morris shareholders (after taxes).[67]

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[64] Four states (Mississippi, Texas, Florida and Minnesota) signed separate, and essentially identical agreements with the tobacco companies.

[65] W. Kip Viscusi, *From Cash Crop to Cash Cow, How Tobacco Profits State Governments*, 20 REG. 1 (1997), *available at* http://www.cato.org/joubs/regulation/reg20n3b.html.

[66] George J. Annas, *Tobacco Litigation As Cancer Prevention: Dealing with the Devil*, 336 NEW ENG. J. MED. 304-08 (1997) ("To the extent that the individual smoker dies earlier than he or she would otherwise have died, the federal govern-

In truth the payments scheduled by the Multistate Agreement are in no way based on any calculation of losses suffered by the states. Rather, they are amounts that the parties calculated could be added to the price of cigarettes without significantly reducing the consumption that both governments and the tobacco companies desire.[68] The states make no pretense of using their settlement payments to help smokers, either: these payments are building roads, repairing sidewalks, funding college scholarships and even subsidizing the planting of tobacco crops![69] The mayor of the country's largest city has proposed using $300 million to indemnify people wrongfully injured or killed by city policemen—this is a clear attempt to deflect true tort liability onto a party that had nothing to do with the tort in question.[70] The National Conference of State Legislatures estimates that eight percent of the payments made to the states have been budgeted for anti-smoking campaigns—the remainder has been slated for "general costs".[71] The unashamed use of the tobacco payments by the states to fund their own addiction to money gives the lie to any claim that smoking has caused them direct financial damage.

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ment may even get a net savings from Social Security and Medicare – and also from Medicaid, which pays for nursing home care for nonsmokers who live longer than smokers.").

[67] Andy Newman, *The Economics of Cigarettes: Smoke One for the Tax Man*, N.Y. TIMES MAG., Feb. 28, 1999, at 21.

[68] *See* Multistate Agreement, Article IX(b), (c), *at* http://www.naag.org/tobac/cigmsa.rtf.

[69] Editorial, *Addictive Tobacco Money*, INVESTORS BUS. DAILY, Aug. 27, 1999, at 12.

[70] *See* Jablon, *supra* note 62 and accompanying text.

[71] Rachel Zoll, *Lawsuits Filed to Give Smokers a Portion of Tobacco Settlement*, ASSOCIATED PRESS NEWSWIRE, Jan. 27, 2000.

2. No Damages to Which Government May Be Subrogated

If the basis for the government lawsuits is not direct harm to government, but rather the harm suffered by individual citizens and paid by governments through Medicaid or other programs, then no recovery is allowed for classic common law reasons. Quite simply, these citizens have not subrogated the government to their rights. In any event individual smokers have no individual causes of action to subrogate.

Although cigarette manufacturers have indeed been loath to admit the health risks of their products, every study done shows that smokers as a class have not been bamboozled by tobacco companies. Indeed, a carefully done study shows that people actually appear to *overestimate* the one very established risk of habitual smoking: contracting pulmonary diseases like lung cancer, bronchitis and emphysema.[72] According to a 1991 RAND Corporation study, smoking reduces the life expectancy of a twenty year-old smoker, who continues to smoke indefinitely, by 4.3 years—not a trivial concern to be sure, but not the horror that is usually portrayed to (and apparently believed by) smokers. And this 4.3 year span, which is far lower than those stated by anti-tobacco zealots, can itself apparently be cut by over eighty percent using existing medical technology.[73] There is no fraud suit by smokers to which governments could be subrogated. Individual lawsuits against tobacco companies by smokers have consistently resulted in defense verdicts: juries find that smokers have knowingly assumed the risks of smoking.

Non-smokers have surely not assumed any risk, though: what are the risks of second-hand smoke? Alas, the second-hand smoke "scandal," much paraded by attorneys general, turns out to be smoke and mirrors. As Robert Levy and Rosalind Marimont have shown, the purported statistically significant link between second-hand smoke and health problems is invalid.[74] Levy and Marimont gave the lie to a March 1998 World Health Organization report entitled "Passive Smoking Does Cause Lung Cancer, Do Not Let Them Fool You," in which WHO researchers purported to find "an estimated 16% increased risk of lung cancer among nonsmoking spouses of smokers. For workplace exposure the estimated increase in risk was 17%."[75] Interestingly, the very next line of the WHO report warned that "due to small sample size, neither increased risk was statistically significant."[76]

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[72] KIP VISCUSI, CIGARETTE TAXATION AND THE SOCIAL CONSEQUENCES OF SMOKING (Nat'l Bureau of Econ. Research, Working Paper No. 4891, 1994).

[73] *See* Denise Grady, *CAT Scan Process Could Cut Deaths from Lung Cancer*, NEW YORK TIMES, July 9, 1999, at A1.

The full WHO study would "not see the light of day for seven more months, until October 1998, when it was finally published in the *Journal of the National Cancer Institute*."[77] Reports of this article failed to mention statistical insignificance, however.

> Instead, they . . . trumpeted relative risks of 1.16 and 1.17, corresponding to 16 and 17 percent increases, as if those ratios were meaningful. Somehow lost in the media blitz was the National Cancer Institute's own guideline: "Relative risks of less than 2 [that is, a 100 percent increase] are considered small . . . . Such increases may be due to chance, statistical bias, or effects of confounding factors that are sometimes not evident." To put WHO results in perspective, note that the relative risk of lung cancer for persons who drink *whole milk* is 2.4. That is, the [alleged] increased risk of contracting lung cancer from whole milk is 140 percent— more than eight times the 17 percent increase from second-hand smoke.[78]

In reality, whole milk consumption is most likely only coincidentally related to lung cancer death rates: like second-hand smoke, confounding factors (children of smokers and whole milk drinkers turn out to be less wealthy and educated than average, for example) are likely the causal factors.

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[74] Robert A. Levy & Rosalind B. Marimont, *Lies, Damned Lies, & 400,000 Smoking-Related Deaths*, 21 REG. 24 (1998), *available at* http://www.cato.org/pubs/regulation/regv21n4/lies.pdf.

[75] Press Release, World Health Organization, Passive Smoking Does Cause Cancer, Do Not Let Them Fool You (Mar. 9, 1998), *available at* http://www.who.int/inf-pr-1998/en/pr98-29.html.

[76] *Id.*

[77] Levy & Marimont, *supra* note 74, at 24; *see* Paolo Boffetta et al., *Multi-Center Case Control Study of Exposure to Environmental Tobacco Smoke and Lung Cancer in Europe*, 90 J. NAT'L CANCER INST. 1440 (1998), *available at* http://www5.who.int/tobacco/repository/tpc57/IARC.pdf.

[78] Levy & Marimont, *supra* note 74, at 24.

What should have mattered most to government officials and concerned parents is one decisive pronouncement from the WHO study. "After examining 650 lung cancer patients and 1500 healthy adults in seven European countries, WHO concluded that the 'results indicate no association between childhood exposure to environmental tobacco smoke and lung cancer risk.'"[79]

A federal judge recently lambasted the Environmental Protection Agency for its own "junk science" exaggerations of the risks of smoking:[80] Junk science does no better of a job in the hands of the attorneys general.

3. The Illegality of the State Tobacco Suits

The settlement achieved by the state governments (and sought by the federal government) is in reality a price fixing agreement that, in addition to being foreign to tort principles, contravenes antitrust law and quite possibly the Constitution.

The Multistate Agreement requires companies to pass through their payments as cigarette price increases. Tobacco companies, in fact, immediately raised the price of cigarettes an average of forty-five cents per pack to pay for the settlement.[81] Absent the agreement, these price increases would not have been competitively sustainable. But they are enforced through the Multistate Agreement, which forces any new entrant into the tobacco industry to either set its prices at the same high levels as the settling companies or to stay out of the industry altogether. Under the Agreement, tobacco companies may cease their annual payments to the states if the states don't exclude new market entry in this way.[82] In essence, the tobacco companies have purchased, with smokers' money, the right to fix prices and exclude competitors by enlisting the fifty states' help. The states have become complicit in this price fixing in exchange for an increased share of the booty. This is the best explanation for the tobacco settlement. An extremely strong argument can be made that the settlement violates the Sherman Act and, quite possibly, the Commerce Clause of the United States Constitution.[83]

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[79] *Id.*

[80] Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA, 4 F. Supp. 2d 435, 465-66 (M.D.N.C. 1998).

[81] It is interesting to note that Philip Morris's fourth quarter tobacco-derived profits rose 1.1% despite a 4% drop in sales caused by the price increases. *See* Gordon Fairclough, *Philip Morris's 4th-Quarter Net Rises As Cigarette Unit Shows Improvement*, WALL ST. JOURNAL, Jan. 27, 2000, at B19.

Meanwhile the architects of this scheme, the contingent fee attorneys representing the states, have become centi-millionaires (in several cases, billionaires). For their part, sick smokers—the alleged victims of the tobacco companies' malfeasance—receive essentially nothing from the settlement.[84] The bulk of state receipts has, as indicated earlier, been deposited in their general revenue funds. Yet of course smokers are paying for this scheme. This type of "solution" to the tobacco "problem" is in reality a regressive tax (smokers are, on average, poorer than nonsmokers) which would never have passed muster if proposed as legislation. When achieved under the cover of a tort suit, the tobacco settlement's contribution to the rule of law seems worthy of Lewis Carroll's Cheshire Cat.

As is the case for the firearm suits, this distortion of tort has corrupted the body politic. For example, Richard Scruggs, the Mississippi attorney behind the settlement scheme, paid an employee of the Brown & Williamson Tobacco company to take documents that he and other attorneys subsequently used. The Brown & Williamson employee received a $110,000 house, two cars, a $17,000 boat, and in 1999, a final payment of $1.5 million for his services.[85] Many of the law firms chosen by each state's Attorney General to sue the industry have charged fees that clearly violate the "reasonableness" requirement of the Canons of Ethics. Lots of this money is, rather transparently, being funneled back to the campaign funds of the Attorneys General. At least one state attorney general is alleged to have executed a fraudulent contingent fee agreement with a law firm (which did no work on the case but claimed over $200 million in fees), then resigned his post to join that firm.[86]

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[82] *See* Multistate Agreement, *supra* note 68, at Article IX, and Exhibit T.

[83] THOMAS C. O'BRIEN, CONSTITUTIONAL & ANTITRUST VIOLATIONS OF THE MULTISTATE TOBACCO SETTLEMENT 1, 10 (CATO Policy Analysis, No. 371, 2000).

[84] On January 27, 2000, lawyers in eight states announced that smokers were suing the states for "billions of dollars" as their share of the tobacco companies' payments. Rhode Island's Attorney General responded that the recoupment suits were meant to serve "a broader purpose" than compensating smokers. The "broader purpose," presumably, is to swell state coffers. *See* Zoll, *supra* note 71.

[85] Michael Orey, *A Tobacco Turncoat's Odyssey: Surprise Ending for a Paralegal Who Was a Spy*, WALL ST. J., Sept. 13, 1999, at B1, *available at* 1999 WL-

4. The Outrage of the Federal Tobacco Suit

In addition to state governments, other so-called indirect "victims" of smoking have reached for the brass ring. Health plans and unions have seen their lawsuits summarily dismissed.[87] On the astounding grounds that blacks choose to smoke proportionally more often than whites, the NAACP has threatened a particularly ridiculous lawsuit.[88] But the most serious current threat to the rule of law is the federal tobacco suit.

In 1997 Attorney General Janet Reno testified before the Senate that the federal government had no legal cause of action to recover Medicare costs from tobacco companies. Two years later, General Reno nonetheless filed suit. She was reportedly under pressure from a White House that had just failed to enact its desired 55-cent per pack federal cigarette tax increase.[89]

WSJ 24913397.

[86] *See Ex-Attorney General of Texas Faces Probe in Tobacco Suit Claim*, THE WALL ST. JOURNAL, June 3, 1999, at C21, *available at* 1999 WL-WSJ 5455029C21; Suein L. Hwang, *A Little-Known Lawyer, a Billion Dollar Bill*, WALL ST. JOURNAL, Dec. 10, 1998, at B1, *available at* WL-WSJ 18995128.

[87] *See* Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999); Nat'l Asbestos Workers Med. Fund v. Philip Morris Inc., 270 F.3d 984 (2d Cir. 2001).

[88] For the intellectual inspiration for this suit, see Danny David, *Three Paths to Justice: New Approaches to Minority-Instituted Tobacco Litigation*, 15 HARV. BLACKLETTER L.J. 185 (1999), which advocates minority suits against tobacco companies and discusses pending litigation and congressional hearings on the matter.

[89] *Regulation Is Out, Litigation is In*, USA TODAY, Feb. 11, 1999, 15A; *see also* WORTH magazine (Jan. 2000).

The federal litigation displays all the legal and factual weaknesses of the state lawsuits, plus a few more:

- There is vast evidence that federal officials were not duped by tobacco manufacturers but have for decades known that smoking is dangerous.[90] Since 1964, the federal government has mandated that every pack of cigarettes sold in the United States carry a warning of the health risks of smoking. This makes it particularly difficult for Washington policy-makers to claim that it did not know of these adverse effects.
- The federal government cannot claim it is subrogated into individual federal workers' rights. In 1997, the Department of Veterans' Affairs rejected claims against it by veterans to cover alleged smoking-related illness suffered by soldiers *to whom the Department had supplied free cigarettes*, on the grounds that the veterans were well aware of the risks of smoking. Cigarettes were, it turns out, distributed without cost by the federal government to servicemen until 1974, a full decade after the government required health warnings.

In 1947, the United States Supreme Court, in *United States v. Standard Oil*,[91] made it clear that the federal government could not recoup the health care costs it had expended from alleged tortfeasors, unless it had express statutory authorization to do so.[92] The court held that, because common law tort doctrines are state-based, the federal government could not argue for the creation of any new common law cause of action in federal court.[93] Only public ordering, i.e., a fiscal or regulatory statute, could allow for such recovery.

- In response to this ruling, Congress passed the Medical Care Recovery Act (MCRA), allowing the federal government to independently file suit to recover costs for medical treatment provided to military personnel and other federal employees suffering from injuries caused by third-party negligence. But statutory language and court interpretations of this statute all clearly indicate that MCRA, passed before Medicare was even enacted, was not intended to be used to recover Medicare dollars and does not provide a basis for the federal government's suit against the tobacco companies. Since the statute's enactment the federal government has never once brought an MCRA claim seeking compensation for money paid under Medicare.

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[90] TODD F. GASIANO, FEDERAL LITIGATION AGAINST THE TOBACCO INDUSTRY: ELEVATING POLITICS OVER LAW 13 (THE HERITAGE THINK TANK, No. 1315, 1999), *available at* http://www.heritage.org/library/backgrounder/by1315es.html.

[91] 332 U.S. 301 (1947).

[92] *Standard Oil*, 332 U.S. at 313.

[93] *Id.*

Congress, in 1980 and 1984, amended MCRA to add "Medicare Secondary Payer" provisions, giving the federal government authority to file lawsuits against specific third-party insurers to recover Medicare costs. These provisions allow recovery of Medicare costs from workers compensation plans and group health plans. The Secondary Payer provisions have *never* been interpreted to allow Washington to take tort action against alleged wrongdoers themselves, though: only suits against insurers are envisaged. Moreover, the government would, under Secondary Payer provisions, have to show that the sale of tobacco was a tortious activity.[94] Since, as indicated above, the federal government has regulated, taxed and indeed subsidized tobacco production and given away cigarettes while fully aware of the plant's health risks, such a showing would seem somewhat difficult unless Washington admits being complicit to the "tort."

- Anyway, it is extremely likely that Medicare has *saved* money because of tobacco, as explained above. In what might be seen as a tacit acknowledgement of the weakness of its legal case, the federal lawsuit's "Hail Mary pass" is a Racketeer Influenced and Corrupt Organizations Act (RICO) claim. Under RICO, a person injured in his business or property by a "pattern of criminal activity" can bring a civil claim for treble damages. However, the problems with this claim are legion. Federal courts have specifically held that civil RICO damages accrue to individuals only, and that "Congress did not intend to authorize treble damage actions by the United States pursuant to [RICO]."[95] During the debate preceding the adoption of RICO, an amendment that would have provided for damages to the United States was eventually withdrawn.[96] Furthermore the alleged acts of "racketeering" are laughable. One typical RICO charge contained in the federal complaint is that tobacco industry executives denied marketing their products to children, yet at the same time published "Joe Camel" advertisements in *Sports Illustrated*![97]

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[94] 32 C.F.R. § 537.22 (a)(1) (1998); *see also* J.V. SCHWAN, THE FEDERAL GOVERNMENT HAS NO LEGAL CASE AGAINST THE TOBACCO COMPANIES (Citizens for a Sound Econ., Policy Analysis No. 92, 1999), *available at* http://www.cse.org/informed/217.html.

[95] United States v. Bonanno Organized Crime Family, 879 F.2d 20, 27 (2d

The federal lawsuit looks like a prodigious sham. It is a thinly veiled quest for billions of dollars in additional federal revenue unobtainable through the legislative taxing process. It is an attempted abuse of the common law, which thankfully the federal government does not control. And it is an outrageous use of an anti-Mafia law against an industry that has been a government cash cow for decades.

V. THE LEAD PAINT LAWSUITS

In November 1999, Rhode Island sued eight corporations that at one time manufactured lead paint (or that had acquired companies which at one time manufactured lead paint) in state court in Providence.[98] The suit, which is not removable to federal court, seeks to recover the costs of treatment and "special education" for children diagnosed with high blood lead levels.[99] Rhode Island's lawsuit was matched by Santa Clara County in March 2000.[100] Rhode Island's and Santa Clara County's are true recoupment lawsuits, unlike some earlier cases in which governmental entities sought to recover damages allegedly directly caused to their property by lead paint.[101]

Cir. 1989).

[96] 116 CONG. REC. 35,346-47 (1970).

[97] Appendix to Complaint, United States v. Philip Morris, No. 99-2496 (Sept. 28, 2000)

[98] Whitehouse v. Lead Indus. Ass'n, 2001 WL 345830, at *1 (R.I. Super. Apr. 2, 2001).

[99] The suit also seeks reimbursement of "abatement" costs, i.e., the expense of removing lead paint from public buildings throughout the state. This is not a recoupment claim, and will not be dealt with directly in this article.

[100] County of Santa Clara v. Atl. Richfield Co., No. CV-788657, Superior Ct., Santa Clara County, Cal. (March 23, 2000).

[101] *See* City of Philadelphia v. Lead Indus. Ass'n, No. 90-7064, 1992 WL 98482, at *1 (E.D. Pa. Apr. 23, 1992).

Because background risks of lead are less widely known, and more likely to be misunderstood, than is the case for tobacco and firearms, the next section will provide a brief historical sketch. This will facilitate the analysis of the recoupment suits which follow.

A. *Lead in Paint: A "Primer"*

Lead, a silvery blue metal of bright luster, does not naturally exist in pure elemental form (Pb). Rather, lead is extracted from complex ores and minerals, notably lead sulfide (PbS, a lead-sulfur compound), also known as galena. Extremely malleable and resistant to corrosion, extracted lead has for centuries been one of the most widely used materials in the manufacture of a variety of valuable commodities, from crystal to car batteries and from x-ray machines to shields for radioactive devices. Lead pigment[102] has been used as a component of decorative paint since ancient Egypt, Greece and Rome. As production techniques became more refined, lead pigment assumed a vital role as part of protective paint as of about 1600 C.E.[103]

There are several types of lead pigment used in paint. "*White lead*," or lead carbonate (PbCO3), the oldest white paint pigment known, dates from before the Christian era. It was likely discovered as a byproduct of the tanning process. Tanning pails were lead lined as a protection from harsh chemicals used to tan animal hides. During the tanning process, the lead reacted with these chemicals to form "white lead," while the animal fats formed a natural binder for what was in effect primitive paint.[104]

As it turns out, white lead is a pigment which has a myriad of highly favorable reactive properties when combined with oil binders. As paint weathers, oil binders break down to form acidic compounds such as formic, hydroxyacetic, propionic and related organic acids. These acids might liquefy or soften the paint, destroying it. But lead pigments neutralize these acids, and thus stabilize oil paint. In this way, paint's durability is greatly improved. In addition, lead also plasticizes paint, increasing its flexibility (or "spreadability").

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[102] A pigment is a fine powder that either strongly scatters light (yielding a white effect) or absorbs certain wavelengths of light, producing colored effects.

[103] Paint and Varnish, Microsoft® Encarta® Online Encyclopedia 2000, *at* http://encarta.msn.com

[104] Pigment, when added to a "binder" (a liquid that dries, or solidifies, when exposed to air, like linseed or other oils), forms paint.

The "lead soaps," another term for the chemical compounds formed when lead interacts with oil binders, act as plasticizers and prevent the paint from cracking as painted surfaces move and shift over time. Also, white lead pigmented paints are highly water repellent. Water tends to dissolve and emulsify portions of a binder, causing softening and swelling of the paint; this is in fact the greatest single cause of loss of adhesion. But paints containing lead pigments are highly resistant to water, and absorb only a small fraction as much water as do non-lead paints. Finally, white lead contributes to ease of mixing, painting (inaccuracies in thinning or other inexpert application of lead paint typically have no adverse esthetic effect), uniform drying, and (when mixed with other pigments to give color) tint retention and gloss. White lead, in sum, added more desirable paint qualities for protective purposes than any other white pigment.

"Red lead" or lead oxide (Pb3O4), has long been considered the standard priming coat for the protection of iron and steel against corrosion and rust. In addition to the properties described above, red lead effectively inhibits the anodic solution of steel through its oxidizing character and buffering action. It is the priming coat of paint on the San Francisco-Oakland Bay, Brooklyn and George Washington Bridges. Millions of tons of ships used by the United States Navy have been primed with red lead paint.

Other leads used in paint include "yellow lead" (or lead chromate) and "blue lead" (or sulfate-blue[105]).

The industrial revolution, which necessitated extensive use of coal and other fossil fuels, resulted in unparalleled soot and acidic byproducts of combustion. This and other factors resulted in increased demand for lead-based paints, since lead becomes mildly soluble when exposed to acidic conditions (such as acid rain). Lead paint's "self-cleaning" property (a microscopic top layer of the paint, containing the carbonized pollution, is washed away with each rain) made it the standard for exterior house paints. The best exterior paints contained as much as 50% lead, measured by dry weight. Lead's other advantageous properties made it desirable in interior paints as well, though its relatively high cost limited its use as a primary interior paint to the wealthy. Those on a budget tended to limit interior paint use to high maintenance areas like kitchens and bathrooms.

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[105] Sulfate blue is a pigment containing lead sulfate, lead sulfide and lead sulfite.

It's worth noting briefly that lead's value as a consumer product was not limited to paint. For use in high-compression engines, it is advantageous to produce gasoline that will burn evenly and completely in order to prevent "knocking", which is the sound and damage caused by premature ignition of a part of the fuel and air charge in the combustion chamber. The antiknock characteristics of a gasoline are directly related to its efficiency and are indicated by its octane number.[106] Adding tetraethyl lead (Pb(C2H5)4) to raw gasoline, it turns out, was until the 1970s the most effective way known to improve gasoline's efficiency.

Lead's use in the protection of buildings, in the fueling of motor vehicles and in the manufacture and safeguarding of many other items indispensable to modern living[107] made the element indispensable to modern civilization. But lead's ubiquitous use has had health costs which have only gradually been discovered.

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[106] This is a rating that describes performance of a fuel in comparison with that of a standard fuel containing given percentages of isooctane and heptane. If the performance of the rated fuel is the same as that of a standard fuel with a certain percentage of isooctane, the octane number given the rated fuel is the same as the percentage of isooctane in the standard fuel. The higher this number, the less likely a fuel is to cause knocking. Gasoline, Microsoft® Encarta® Online Encyclopedia 2000, *at* http://encarta.msn.com

[107] Lead is used in enormous quantities in storage batteries and in sheathing electric cables. Large quantities are used to line pipes, tanks and medical apparatus. Lead is also a common shielding for radioactive material.

B. Lead Blood Levels and Human Health

1. The Old Paradigm

Industrial physicians have known since the last century that lead accumulates in human bodies,[108] and that lead poisoning results when too much lead is absorbed. Until the mid-twentieth century, it was held that lead poisoning was evidenced by, and required the presence of, one or more of the following symptoms: seizures, coma, peripheral neuropathy, abdominal pain and anemia.

Studies by path-breaking researcher Robert Kehoe found that every living person (from Mexican peasants living in homes containing no lead products[109] to healthy residents of United States cities,[110] to workers in the lead industry[111]) had some lead in their body. Lead in urine and feces meant that everyone, even newborn babies, excreted lead. Despite lead in virtually every living person, however, virtually none (apart from some workers in lead industries, when exposed to massive dust clouds of lead) had symptoms of lead poisoning. Following in the tradition of industrial physicians before him, Kehoe interpreted this data to signify that daily ingestion of small amounts of lead was harmless, and that poisoning occurred only when a threshold of toxicity was exceeded. Kehoe measured dietary intakes of those who did not work in lead industries and found that, on average, their daily food contained from 0.16-0.28 mg lead. Rural Mexicans ingested nearly as much in their diet.[112] Kehoe gave volunteers who worked in lead industries up to 2.0 mg per day for months without provoking known symptoms of lead poisoning—when he measured their blood levels, he found them in the range of 60-70 migrograms/100 cc of whole blood.[113] He also found that workers in tetraethyl plants and gasoline stations did not absorb enough lead from gasoline fumes to develop symptoms of poisoning.[114] Kehoe and others concluded that only excessive exposure to lead created a risk of lead poisoning.

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[108] Small amounts of lead are excreted in urine and feces, but most absorbed lead remains inside the body. Measuring these excretions allowed early researchers to estimate absorption levels, before blood lead tests were developed. *See* Robert Kehoe & F. Thamann, *The Excretion of Lead*, 92 JAMA 1418 (1929)

[109] Robert Kehoe, et al., *On the Normal Absorption and Excretion of Lead: I. Lead Absorption and Excretion in Primitive Life*, 15 J. INDUS. HYGIENE 257 (1933)

[110] Robert Kehoe, et al., *On the Normal Absorption and Excretion of Lead: II. Lead Absorption and Excretion in Modern American Life*, 15 J. INDUS. HYGIENE 273 (1933)

[111] Robert Kehoe et al., *On the Normal Absorption and Excretion of Lead: III. Lead Absorption and Excretion in Certain Lead Trades*, 15 J. INDUS. HYGIENE 306 (1933)

[112] *Id.*

The first widespread epidemic of poisoning among children, occurring in Baltimore in 1932, was a direct product of the Great Depression. In order to cook, many poor families found and burned wood casings from storage batteries. Soaked in lead-containing fluids, these casings gave off high lead dosages in addition to heat. In just five weeks, forty children were afflicted.[115] In regards to exposure to lead paint, researchers found instances of poisoning among two classes of people: paint workers who applied lead paint incompetently, and infants and toddlers who swallowed prodigious quantities of lead paint which had been used on their cribs, toys, playpens and, in some cases, window sills.

As to the former, improper scraping and sanding of old paint[116] had long been known[117] to create clouds of lead dust, which if inhaled over long periods of time would cause lead poisoning. Government publications had trained commercial painters in good practices since the turn of the century.[118] As to the latter, studies in Baltimore and Boston revealed that children were grievously poisoned when they scraped away, or otherwise chewed for long periods, on furniture painted with lead paint. As early as 1933 it was reported by two Boston physicians that new cribs were no longer being painted with lead paint, and that "the better grades of toys are largely free of lead pigment."[119] Baltimore, Boston and New York all embarked on educational campaigns designed to encourage parents to keep babies, and older infants subject to eating disorders,[120] from chewing on lead painted surfaces.[121] As manufacturers had essentially stopped making toys and cribs with lead paint,[122] and as non-lead-based paints[123] were far less durable, the cities' main concern was that ignorant parents would use lead pigments when repainting.[124]

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[113] Robert Kehoe et al., *Experimental Studies on Lead Absorption and Excretion and Their Relation to the Diagnosis and Treatment of Lead Poisoning*, 25 J. INDUS. HYGIENE 71; Cholak & Bambach, *Measurement of Industrial Lead Exposure by Analysis of Blood and Excreta of Workmen*, 25 J. INDUS. HYGIENE 47

[114] Kehoe, Thamann & Cholak, *An Appraisal of the Lead Hazards Associated with the Distribution and Use of Gasoline Containing Tetraethyl Lead*, 16 J. INDUSTRIAL HYGIENE 100 (1934) *and* 18 J. INDUSTRIAL HYGIENE 42 (1936).

[115] H. Williams, et al., *Lead Poisonings from the Burning of Battery Casings*, 100 JAMA 1485 (1933). One of the most important consequences of the battery casing tragedy is that it sparked the interest of Huntington Williams, the lead author of this study. Williams was Baltimore's health commissioner from 1932 to 1962. As a result of his efforts, Baltimore became the leading city in efforts to understand childhood lead poisoning.

[116] Dry-sanding methods created clouds of lead dust which were absorbed into the lungs of the painters. Wet-sanding methods, however, allowed old paint, lead and all, to be wiped away with waste water. Painters could avoid poisoning entirely by using such methods.

[117] *See, e.g.*, TANQUEREL DES PLAUCHES, LEAD DISEASES: A TREATISE 56-57 (Samuel L. Dana trans.) (1850).

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[118] *See, e.g.*, ALICE HAMILTON, HYGIENE OF THE PAINTERS' TRADE BUREAU LAB. STAT. BULL. 65 (1913) ("Paint dust is caused chiefly by rubbing old or new paint with dry sandpaper. This process is universally recognized as the most dangerous part of the painter's trade. It could be completely done away with by the use of cheap mineral oil to wet the sandpaper and catch the dust.").

[119] Charles McKhann & Edward Vogt, *Lead Poisoning in Children*, 101 JAMA 104 (1933).

[120] Children with unusual desires to eat non-food sources were commonly diagnosed with "pica," and were held to be unusually susceptible to lead poisoning for that reason. *See* J. Ruddock, *Lead Poisoning in Children, With Special Reference to Pica*, 82 JAMA 1683 (1924).

[121] *See, e.g.*, F. Schwentker, *Children Who Eat Paint*, *in* KEEPING WELL I, THE SECOND SERIES OF RADIO TALKS BROADCAST BY THE BALTIMORE HEALTH DEPARTMENT AND THE MEDICAL AND CHIRURGICAL FACULTY OF MARYLAND, 1933-1936 (1937).

[122] In 1936, the Consumers' Union sampled the paint on toys sold at Kress, Kresge and Woolworth stores. It found none were painted with lead paint. *See Lead Hazard in Toys*, CONSUMER REP. May 1936.

[123] Lithopone and titanium oxide were used as substitutes for lead compounds.

[124] One physician from Baltimore explained the status of public health efforts in 1947 this way: "We know that the brand new cribs coming from the manufacturers do not contain lead at all. They are perfectly safe to use. We have never had a case of lead poisoning in a crib from the original paint. What happens is that the paint wears off, and it is in the re-painting that danger occurs." J. McDonald, M.D., Comments at the American Medical Association Conference on Lead Poisoning 57 (1947) (on file with author).

The educational campaigns seemed to work: physicians at Children's Hospital in Boston noted a decline in admissions of lead-poisoned children from twenty-one in 1931 to three in 1939.[125] The use of lead in paint, including interior paint, was not deemed hazardous as long as ingestion of chips by children was avoided. The American Public Health Association's 1936 warning about lead paint was illustrative:

> Doctors are now reporting cases of lead poisoning in infants and children apparently due to biting paint from cribs and playthings. It is likely that many more cases are caused in this way than become known. Although lead paint has many wide fields of usefulness, babies' toys, beds and carriages are not the places to put it. We assume that the manufacturers of such articles will not use anything that might be dangerous, but a warning to parents may be needed. *Train the children as early as possible that food is the only thing meant to be eaten. In re-painting articles that children can get into their mouths the use of lead paints should be carefully avoided.*[126]

It is noteworthy that the lead paint industry cooperated fully in the efforts to identify and eliminate childhood lead poisoning. Immediately after the publication of the first United States Public Health Service report suggesting that children could be poisoned by ingesting lead paint,[127] the recently created Lead Industry Association (LIA) surveyed children's furniture manufacturers and toy companies to ensure that they used lead-free paints as the Health Service recommended. Results from the survey confirmed that lead paint was being abandoned in all these dangerous uses.[128]

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[125] R. Byers & E. Lord, *Late Effects of Lead Poisoning in Mental Development*, 66 AM. J. DISEASES CHILD. 476 (1943).

[126] AMERICAN PUBLIC HEALTH ASSOCIATION, *Poisoning from Toys*, *in* WHAT TO TELL THE PUBLIC ABOUT HEALTH 20 (2d. ed. 1936).

[127] *Lead-free Paint on Furniture and Toys to Protect Children*, UNITED STATES DAILY, Nov. 20, 1930, at 1.

[128] The only record of the survey and of its results is its inclusion in a report compiled on lead poisonings for the Prudential Insurance Company. *See* F.L. Hoffman, LEAD POISONING LEGISLATION AND STATISTICS 19 (1933). Hoffman there reproduces a warning letter sent by the LIA to all toy and furniture manufacturers on November 30, 1930—barely ten days after the publication of the

In sum, before 1950 lead paint hazards to children were clearly identified: the culprit was cribs, toys, and furniture, and the vehicle for poisoning was constant chewing by babies or children afflicted with pica. The public health response was to eliminate lead-based paint from these objects, and educating parents not to re-paint them with lead pigment. The lead industry cooperated fully in this program.

2. The Upsetting of the Old Paradigm

In 1948 children's lead poisonings in Baltimore (the only city to test blood lead levels in children) suddenly rose again. The *Baltimore Health News* reported:

> There were 31 such cases in 1948, considerably more than the number recorded in any prior year. These cases were carefully investigated and were found to have resulted chiefly from chewing painted surfaces such as window sills, or from the eating of dried paint flakes which had cracked or chipped from repainted indoor woodwork areas.[129]

The LIA, through its Director of Health and Safety, Manfred Bowditch, immediately sponsored a study[130] which revealed that flaking lead paint from ceilings and walls in deteriorated and ill-kept homes (which, because they were located in what had once been upper class areas, were painted with lead pigment) was now being ingested by children.[131] Bowditch disseminated this report throughout the country.[132] As a result, in 1951 Baltimore banned the future use of lead paint for home interiors.[133] Manfred Bowditch then became

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USPHS report.

[129] *Lead Poisoning in Children Is Preventable and Can Be Fatal*, BALT. HEALTH NEWS, May 1949, at 122.

[130] A. Baetjer & M. Watt, LEAD INDUSTRY ASS'N, REPORT ON CHILD LEAD CASES OCCURRING IN BALTIMORE FROM JANUARY 1948 TO AUGUST 1949 (1949).

[131] New residents of these districts were less likely to regularly over-paint deteriorating areas of their homes than were their more wealthy predecessors.

[132] *See, e.g.*, NATIONAL SAFETY COUNCIL, LEAD HYGIENE AND SAFETY BULLETIN, 1 (1950).

[133] *New Regulation Prohibits Indoor Lead Paint*, BALT. HEALTH NEWS, Aug.-Sept. 1951, at 114. Santa Clara alleges that a conspiracy of lead paint manufacturers hid the truth from it until 1999, so it couldn't sue before then. All the evi-

instrumental in spreading the news from Baltimore to the rest of the nation. He and LIA induced the American Association of Pediatricians (AAP) and the American Standards Association (ASA) to create a Committee on Hazards to Children. This committee soon had both AAP and ASA adopt standards limiting lead content in interior paint to one percent.[134] Both the LIA and the National Paint, Varnish and Lacquer Association agreed with the imposition of national standards and with requiring a warning label on all lead paints, although they objected to using the word "poison" on such a label.[135] George Wheatly, Chairman of the Committee on Home Accidents of the AAP, fully concurred in the industry's approach. He declared in 1954 that

> [Childhood lead poisoning] can be prevented . . . by enforcing housing regulations to clean up run-down blighted tenements where the bulk of the lead poisoning problem exists; [and] by a national standard for labeling of paint to guide users that it is safe for use on children's furniture, toys, and interiors of dwellings.[136]

This abandonment of leaded paint for indoor use by industry as of the mid-1950s represents an astonishingly rapid shift away from the view that only toys and cribs presented health risks. The industry's exceedingly rapid movement (study of the

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dence contradicts this astounding claim.

[134] AMERICAN STANDARDS ASSOCIATION, AMERICAN STANDARD SPECIFICATIONS TO MINIMIZE HAZARDS TO CHILDREN FROM RESIDUAL SURFACE COATING MATERIALS (1955). Note that the one percent limit would remove *all* lead from the pigment which remained on ceilings and walls: the remaining trace content of lead was in the "driers."

[135] "POISON" was not, contextually, the right warning in that era. As the Manufacturing Chemists' Association had stated eight years earlier, "POISON" referred to single dose toxicity and did not accurately describe the hazards from chronic, long term absorption and ingestion. It recommended the use of words such as "DANGER," "WARNING" or "CAUTION." *See A Guide for the Preparation of Warning Labels for Hazardous Chemicals*, 23 CHEM. & ENG. NEWS 992 (1945). Courts have agreed with this view. *See* Porter v. Yoder & Gordon Co., 98 S.E.2d 497, 502 (N.C. 1957).

[136] G. Wheatly, The Lead Poisoning Problem in Children, presented at the Annual Meeting of the Lead Industries Association (April 22-23, 1954) (unpublished typescript on file with author).

peeling and flaking problem ten days after it was first identified; funding of constant research; promotion of a lead-free interior paint standard; dissemination of information from Baltimore to other cities) clearly owes a lot to Manfred Bowditch's efforts, and it easily precedes the legal prohibition of lead paint in 1978 by the Consumer Products Safety Commission.[137]

3. The Creation of a New Paradigm

By the time the CPSC had acted, the paradigm for lead "poisoning" had been transformed radically from its 1930s beginning and its 1950s modification. By the 1970s, physicians were measuring quantities of airborne lead *one one-hundredth* the amount measured earlier in the century, and were concluding that even these trace amounts caused health problems.

In 1974 New York pediatricians measured house dust on children's hands; they concluded that there was enough lead on the hands to raise the blood level dangerously if consumed over a long period of time.[138] By this time so much had changed that experts from the 1930s would not have understood the significance of these findings:

- The definition of "illness" changed. The contorted figures of lead-poisoned children from the 1930s—lethargic, paralyzed, even comatose—were no more. Children diagnoses as "ill" from lead poisoning looked perfectly normal. The concerns in the 1970s were delicate changes in intellectual, behavioral and neurological comportment,[139] measured by tests not available in the 1930s.
- The definition of "poisoning" has changed. In 1937, when the Baltimore Health Department instituted the first and only blood lead testing service for physicians, levels for asymptomatic, unexposed children who did not have pica

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[137] 16 C.F.R. § 1303.1-.5 (2002).

[138] J.W. Sayre et al., *House and Hand Dust as a Potential Source of Childhood Lead Exposure*, 127 AM. J. DISEASES CHILD. 167 (1974).

[139] For example, current lead-induced "illnesses" include hyperactivity, lethargy, and learning disabilities. Much debate rages over the nature and causes of such "illnesses."

ranged from 10-80 micrographs per deciliter (up/d) of whole blood. Those with lead poisoning mostly fell in the range of 100-300 ug/dl.[140] While today one of every eleven children in American has a blood level in this range,[141] virtually *every child in Baltimore* in the 1930s, indeed the average *American urban child* as late as 1976 would today be considered "poisoned."[142] Average blood lead levels for both children and adults have dropped more than 80 percent since the late 1970s, particularly as those of us directly exposed to leaded gasoline age.

- The definition of safe consumption has changed. When Robert Kehoe measured the amount of lead in the average American child's diet in the 1930s, he concluded it was between 160 and 280 micrograms/day. The maximum "safe" daily intake of lead for children has dropped from 300 micrograms/day (approximately the United States Average) in 1971[143] to 100 micrograms/day five years later,[144] to 35 micrograms/day in 1993.[145] Virtually every American child of the 1930s was being "poisoned" by modern standards.
- The definition of "dust" has changed. Instead of limiting their concern to the clouds of lead dust that filled the air around some factory workers, and some painters who used dry-scraping methods, clinicians looked to sources of dust that were not visible, and that came from diverse origins.

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[140] E. Kaplan & J.M. McDonald, *Blood Lead Determinations as a Health Department Laboratory Service*, 32 AM. J. PUB. HEALTH 483 (1942).

[141] *Sources of Lead Poisoning*, MAYO CLINIC HEALTH LETTER, July 14, 1999 (citing U.S. Environmental Protection Agency (EPA) Data).

[142] LEAD-BASED PAINT HAZARD REDUCTION AND FINANCING TASK FORCE, PUTTING THE PIECES TOGETHER: CONTROLLING LEAD HAZARDS IN THE NATION'S HOUSING 35 (1995).

[143] B. King, *Maximum Daily Intake of Lead Without Excessive Body Lead-Burden in Children*, 122 AM. J. DISEASES IN CHILDREN 337 (1971).

[144] NATIONAL RESEARCH COUNCIL C'TEE ON TOXICOLOGY AD HOC COMMITTEE ON LEAD IN PAINT, *Recommendations for the Prevention of Lead Poisoning in Children*, NAT'L ACAD. OF SCIENCES (1976).

[145] Lead in gasoline was reduced in 1973, then reduced further in 1985. It was eliminated as a result of the 1990 Clean Air Act Amendments. *See* 42 U.S.C. § 7574(n) (1994). This phase-out is the biggest single contributor to the reduction of blood lead levels observed today.

> Outdoor roadside dusts contaminated by millions of tons of lead from leaded gasoline emissions, for example, would affect every child who played outdoors, and would accompany that child inside the house again.[146] These types of "dust", and this level of contamination, were not on radar screens in the 1930s.

4. Are Lead Paint Manufacturers Liable to Individuals?

Are Santa Clara County's and the State of Rhode Island's recoupment suits against paint and pigment manufacturers well-founded? Before answering this question the issue of paint manufacturers' liability to poisoned[147] individuals should be addressed. Under traditional product liability doctrine, each manufacturer would be liable if it produced a defective and unreasonably dangerous product which injured a consumer, or if it failed to warn an unaware consumer of a known danger which ultimately materialized.[148] Individual plaintiffs would have to overcome the following strong defenses if they are to prevail:

- Each defendant will argue that its product was not defectively designed.[149] There was no better way to make lead paint than the way it was made by each defendant.[150] The argument that lead paint is intrinsically dangerous, therefore defective, contradicts substantial case law holding that dangerous products are not as such defective.[151]

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[146] Lead in gasoline was reduced in 1973, then reduced further in 1985. It was eliminated as a result of the 1990 Clean Air Act Amendments. *See* 42 U.S.C. § 7545(n) (1994). This phase-out is the biggest single contributor to the reduction of blood lead levels observed today.

[147] *See supra*, p. 657, discussion of "poisoned."

[148] *See* REST. (SECOND) OF TORTS, §402A(1) (establishing strict liability of product sellers for injury to users or consumers); REST. (THIRD) OF TORTS §§ 1, 2 (seller or distributor of a product liable for injuries caused by a defect in manufacture or design or due to inadequate instructions or warnings).

[149] RESTATEMENT (SECOND) OF TORTS § 402A(1); RESTATEMENT (THIRD) OF TORTS § 2(b).

[150] Sabater v. Lead Indus. Ass'n, 704 N.Y.S.2d 800 (N.Y. Sup. Ct. 2000).

[151] *See, e.g.* Halliday v. Sturm, Ruger & Co., 770 A.2d 1072 (Md. App. 2001); Hines v. Remington Arms Co., Inc., 648 So. 2d 331 (1994); Puryear v. Tanfoglia Compania, S.P.A., 19 Va. Cit. 213 (1990).

The "state of the art"[152] in interior paint consisted of making it from lead pigment until the 1950s, and as soon as knowledge was available (well before mandated to do so by government), each defendant changed its formulation of indoor paint by removing lead.

- Each defendant will show that its product was not defectively manufactured.[153] There has been no allegation that paints were adulterated or otherwise poorly made.
- Each defendant will argue that it did not fail to warn consumers of known dangers.[154] As soon as each danger of lead paint became known, industry representatives *disseminated* knowledge of that danger to city health authorities (who were arguably, during that period, the most efficient purveyors of information to the affected families), and encouraged the adoption of standards eliminating lead from paint whenever warnings were not likely to be followed.
- Most individuals "poisoned" by lead today cannot trace their contamination clearly to lead paint, as opposed to other sources of lead such as gasoline or food containers. "Cause in fact," in other words, cannot be established.[155]
- Where cause in fact is clear (e.g., where children have ingested lead paint), proximate cause is a problem.[156] Intervening causal events, such as neglected house upkeep and lack of parental supervision of the infant victims, arguably are more proximate causes of ingestion of paint.

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[152] *See* Feldman v. Lederle Laboratories, 479 A.2d 374, 452 (N.J. 1984) (limiting *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539 (N.J. 1982), which rejected the "state of the art" defense, to its facts); *Ex parte* Chevron Chem. Co., 720 So. 2d 922, 927-28 (Ala. 1998) (disagreeing with *Beshada*); Vasallo v. Baxter Healthcare Corp., 696 N.E.2d 909, 922-23 (Mass. 1998) (recognizing abrogation of *Beshada*); *In re* Massachusetts Asbestos Cases, 639 F. Supp. 1, 4 (D. Mass. 1985) (criticizing *Beshada*); Bernier v. Raymark Indus., 516 A.2d 534 (Me. 1986) (recognizing New Jersey Supreme court's limitation of *Beshada*).

[153] RESTATEMENT (SECOND) OF TORTS § 402A(1); RESTATEMENT (THIRD) OF TORTS § 2(a).

[154] RESTATEMENT (SECOND) OF TORTS § 402A(1); RESTATEMENT (THIRD) OF TORTS § 2(c).

[155] *See infra* note 156 and accompanying text.

[156] *See infra* note 156 and accompanying text.

- Finally, even if a defect, failure to warn, cause in fact and proximate causation were all established, plaintiffs cannot show which defendant manufactured the paint which injured them. Thousands of companies have manufactured lead paint in the United States. Only one product (the generic drug, DES)[157] has resulted in "market share" liability, and even then only in five states.[158] States rejecting market share liability for DES will surely reject it for lead paint. Even in those states which accepted market share liability for DES, the doctrine is unlikely to be extended to leaded paint. Paint, unlike DES, is unique in composition—lead content can vary from less than one percent to over 50 percent, for example. It is truly impossible to establish any market share under such circumstances.

It is not surprising that individual plaintiffs have largely failed to prevail over lead paint manufacturers.[159] Individuals have been more successful in contract suits against landlords who have rented defective (because of deteriorated lead paint) lodgings, for breach of the implied warranty of habitability.[160] These suits invoke traditional legal concepts, and suffer from none of the encumbrances chronicled above.[161]

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[157] DES (diethylstilbestrol) is a synthetic estrogenic hormone which duplicates the activity of estrogen, a female sex hormone present in all women and, to a lesser extent, also in men. Collins v. Eli Lilly, 342 N.W.2d 37, 43 (Wis. 1984).

[158] The states are California, Washington, Florida, Wisconsin and New York. Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980) (allowing "market share" liability upon showing that defendant manufacturers produced a substantial percentage of DES on the market, with each manufacturer liable for its proportion of judgment represented by its share of the DES market); Conley v. Boyle Drug Co., 570 So. 2d 275, 286 (Fla. 1990) (adopting the *Martin* approach, subject to showing that plaintiff has made a genuine attempt to locate and to identify the manufacturer responsible for her injury); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989) (adopting market share liability based on national DES market, unless defendant did not solely market DES for pregnancy use); Martin v. Abbott Labs., 689 P.2d 368, 382 (Wash. 1984) (plaintiff suing in DES case under market share liability theory need only sue one manufacturer, subject to pleading certain elements of action); *Collins*, 342 N.W.2d at 50 (DES plaintiff may plead market share liability theory against single manufacturer, subject to pleading certain elements of action).

[159] *See* Scott Shane & Caitlin Francke, *Angelos Targets Lead Paint; Lawyer Alleges 60-Year Conspiracy by Manufacturers*, BALT. SUN, Sept. 21, 1999, at A1; *see also* Kurczi v. Eli Lilly, 113 F.3d 1426 (6th Cir. 1997); Jefferson v. Lead Indus. Ass'n, 106 F.3d 1245 (5th Cir. 1997); City of Phila. v. Lead Paint Ass'n, 994 F.2d 112 (3rd Cir. 1993); Santiago v. Sherwin-Williams Co., 782 F.Supp. 186 (D. Mass. 1992), *aff'd* 3 F.3d 546 (1st Cir. 1993); Brenner v. Am. Cyanimid, 699 N.Y.S.2d 848 (1999); Skipworth v. Lead Paint Ass'n, 690 A.2d 169 (Penn. 1997).

5. Are Lead Paint Manufacturers Liable to Cities?

Individual plaintiffs' obstacles in suing paint manufacturers seem trifling when compared to those faced by local governments. Following the approach employed apropos tobacco and firearms, an enumeration of the requirements of a successful government suit shows that the government suits meet none of the criteria of successful tort suits:

6. No Wrongdoing

The fabrication and sale of lead-based paint was done responsibly, following the best science available. The defendants were instrumental in warning painters of proper application techniques, and in warning parents of dangerous toys as soon as knowledge of these dangers was brought to their attention. When the risk of massive ingestion of paint chips by children in deteriorated housing was first observed, the industry reacted with great speed in voluntarily warning parents of this risk, and in fact ceased marketing lead paint for indoor use many, many years before governments (including Rhode Island's and Santa Clara County) themselves prohibited it.[162] Additionally the defendants are not strictly liable to governments under modern Products Liability law. A cause of action under strict liability could only possibly accrue to the injured, and in fact, for reasons listed above, the defendants are not strictly liable to individual children.

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[160] *See Verdicts in Lead Poisoning Cases in the 1990's*, 5 MEALEY'S LITIG. REP.: LEAD (Meadley) No. 17, at 29 (June 5, 1996).

[161] Statutes in some states facilitate suits against property owners by creating affirmative duties to inform tenants of the presence of lead paint and to abate deteriorating paint. *See, e.g.*, MASS. ANN. LAWS ch. 111, §§ 189A-199B (1996); Md. CODE ANN., ENVIR. § 6-801-852 (1996); VT. STAT. ANN., 18 §§ 1751-1765 (Supp. 2001).

[162] *See* New York City Coalition to End Lead Poisoning v. Koch, 524 N.Y.S.2d 314 (1987).

7. No Causation

Even if wrongdoing had been established, the county's and state's suits must fail for lack of causation. "Lead dust" poisoning has many causes; to isolate lead paint is to select one set of causes arbitrarily. For most children, then, plaintiffs cannot establish "cause in fact"; i.e., they cannot establish that, but for lead paint, the affected children would not have high blood lead levels.[163] No effort has been made to determine the role of leaded gasoline deposits, lead in food and lead in container material, as opposed to lead paint. In any case, the amount of lead used in different brands of interior paint has varied widely. Also given the subtle injuries (lowered I.Q., attention deficit disorder, learning disabilities, etc.)[164] now claimed to result from lead paint it is incumbent on the plaintiff governments to prove, by a preponderance of evidence, what each plaintiff's condition would be in the absence of lead paint. No effort has been made to establish such causation.

For the overwhelming majority of allegedly injured children, then, the plaintiffs will utterly fail to establish cause-in-fact. For those comparatively few children who ingested large quantities of lead paint chips over extended periods, on the other hand, cause-in-fact is surely adequately alleged. Although these children's poisoning comes from lead paint, cause-in-fact is not sufficient to establish legal causation. In addition, proximate cause must be established. And proximate cause is lacking. Between the manufacture of lead paint and the ingestion, many unforeseeable new events have broken the causal chain: the decision by owner and tenant to allow the paint to deteriorate and chip, without repair; the decision by the child's parent(s) not to supervise the child for extended periods; et.[165] The "harm" of substantial ingestion of paint chips is not within the "risk" of manufacturing lead paint.

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[163] *See, e.g.*, Jackson v. Glidden Co., 2001 WL 498580 (Oh. Comm. Pl. 2001); *see also* Joseph Ortega & Josh Kardish, *Lead Paint Cases Raise Causation Issues*, NAT'L L.J., Nov. 8, 1993 at 19; Michael B. Sena, 4 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 169, 173-74 (1995); David P. Swenson, *"Market Share Recovery for Risk" as a Preemptive Remedy for Childhood Lead Poisoning*, 11 LAW AND INEQ. 585, 598 (1993); Amber E. Dean, Comment, *Lead Paint Public Entity Lawsuits: Has the Broad Stroke of Tobacco and Firearms Litigation Painted a troubling Picture for Lead Paint Manufacturers?*, 28 PEPP. L. REV. 915, 918-919 (2001).

[164] *See* Sena, *supra* note 149, at 170-71.

The proximate cause of the government's damage, of course, was its decision to assist families allegedly harmed by lead paint. This decision was a social policy resulting from the democratic process. As such, it required payment from tax dollars.

8. No Damages

Finally, even if the plaintiffs succeed in establishing wrongdoing and legal causation, they must show that they have suffered legally cognizable damages. Apart from the relatively insignificant non-recoupment portion of their suits,[166] plaintiff governments are attempting to recover amounts spent to remedy learning disabilities in children allegedly harmed by ingestion of lead dust, as well as moneys spent to remove lead paint from these children's lodgings. These are indirect damages, recoverable by the plaintiff governments if and only if they are subrogated into the children's rights. No such subrogation has been sought, and (as was illustrated immediately above) if there had been subrogation, the cities' suits would fail for the same reasons the children's suits would fail. The lead paint recoupment suits have, in sum, no cognizable damages.

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[165] *See, e.g.*, Cantave v. Peterson, 698 N.Y.2d 721 (N.Y. App. Div. 1999) (restoring landlord's comparative negligence claim); Cooper v. County of Rensselaer, 697 N.Y.S.2d 486, 492 (N.Y. Sup. 1999) (where the parent is made aware of the danger that their infant faces but takes steps that expose the child anyway, the parent's negligence is actionable); Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

[166] Santa Clara is asking for money to abate damages allegedly caused by lead paint to county buildings. But that is a minor portion of its lawsuit. This aspect of Santa Clara's suit is a routine tort suit—for a similar example see *City of Phila. v. Lead Indus. Ass'n*, 1992 WL 98482 (E.D. Pa. 1992). This paper will not address the county's direct suit, except to note that the county must establish defective design or failure to warn, neither of which are available. In addition, the county's lawsuit is almost certainly precluded by statutes of limitation, as the dangers of deteriorating lead paint have been known to governmental agencies for years.

Plaintiff governments have enacted social programs which may be opportune, even admirable. Payment of social programs is the province of taxes, of course. Attempts to cloak these taxes as "fees"[167] or as "tort damages" will not succeed in concealing their real nature.

C. Conclusion

Santa Clara's suit, and those like it, are based on very bad law. But the facts don't help the county either. During the past two decades, average blood lead levels for American children have fallen *over 90 percent,* largely as a result of the elimination of lead from *gasoline* and from *food and food containers.* Unlike those two sources, lead paint has never been a universal poison. It is intrinsically hazardous only to painters – who once upon a time inhaled clouds of lead dust when mixing paint and when dry-sanding lead-painted walls. Even the EPA agrees that lead paint, if it is well maintained and intact, typically poses no health risk. Some children have eaten dust from paint chips that have fallen to the ground in poorly repaired and ill-maintained homes. Those poor maintenance practices are not the paint companies' fault. And interior house paints have contained little or no lead since the mid-1950s because of voluntary industry action taken well before the 1978 federal ban on residential lead pigment.

Santa Clara alleges that a conspiracy of lead paint manufacturers hid the truth from it until 1999, so it couldn't sue before then. No evidence supports this astounding claim. Throughout the 1950s, Lead Industry Association official Manfred Bowditch heroically disseminated knowledge about lead paint hazards when used on cribs, toys and on the interior of dilapidated housing. Baltimore, a main focus of Bowditch's efforts, publicized the risks of paint chips in run-down buildings in 1949. In 1999 a Maryland court dismissed a conspiracy suit against paint companies with the finding that there was "no evidence whatsoever" that manufacturers "concealed any studies, altered any documents or misrepresented any finding." Where has Santa Clara been these last fifty years?

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[167] *See* Sinclair Paint Co. v. Bd. of Equalization, 52 Cal. Rptr. 2d 572 (1996) ("Fees" imposed under the Childhood Lead Poisoning Prevention Act are in fact taxes and must be adopted using the methods prescribed for taxation.).

Today, many affected children (i.e., those with blood lead levels exceeding current CDC guidelines, which incidentally are lower than the *average* urban child's blood lead levels of the 1960s) have absorbed lead-contaminated *soil*, not paint. Lead in soil has many sources, including gasoline as indicated above. Therefore, no proximate causation of this contamination by lead paint can be established. To repeat, the most severely affected children have consumed paint chips. But that can be avoided through proper hygiene, home maintenance (including re-painting) and other abatement (like drywall application).

No causal wrongdoing can be proven against paint manufacturers. In any case, the statutes of limitation have long since run. Also, because the identity of manufacturers of each can of lead paint is unknown, "fictitious defendants" are being sued. Santa Clara has added these "fictitious defendants" to the suit in order to claim damages according to the market shares of hundreds of companies that manufactured lead paint decades ago when it was a legal product and not intrinsically dangerous to consumers.

VI. Public Ordering Alternatives to Regulatory Tort Suits

With so many factors operating to exert pressure to settle on defendants when government is the tort plaintiff, litigation is used to circumvent both the legislature and the judiciary—bypassing not only the laws enacted by our elected representatives but also the assessments of our courts. The federal government's regulatory tort suit against the tobacco industry, coming as it did immediately after Congress rejected President Clinton's proposed new federal tobacco tax, is a powerful illustration of this. Therefore, perhaps we should turn back to the political branches of government in the search for a solution to gun, tobacco, or (in the near future) alcohol or lead paint (or butterfat?) "problems."

A. Taxation

Taxation of disfavored industries is certainly the constitutional procedure—at least it is responsive to democratic processes in ways that litigation is not.[168] Indeed, some anti-gun partisans and like-minded politicians have suggested tremendous increases in taxes on firearms and tobacco. If this were proposed, a public debate could take place in the state houses. It would likely reveal that massive taxes on guns or tobacco are a bad idea for at least three reasons. First, high taxes inevitably lead to black markets. As explained earlier, in the case of guns, black markets would mean that criminals would dominate gun ownership. For guns and tobacco, black market sales (to minors, to felons, etc.) cannot be regulated. For both gun and tobacco levies, current taxes already generate revenues that more than offset public expenses associated with their use. This case has already been made above in regard to tobacco—and any fair-minded calculation of the costs and benefits of firearms must take into account that the social benefits of gun ownership have been shown to vastly exceed its costs.[169] Second, as a matter of tax policy, it's hard to see why tens of millions of honest users of perfectly legal products (firearms) should have to pay because a small number of people are injured by their misuse. It's just as hard to see why the poor (smokers tend to be less wealthy than abstainers) should disproportionately fund state and federal projects. Government illegitimately avoids debating these tax questions, of course, when it sues industries in tort.

The tobacco model is instructive. When Michigan, New York, California and Maryland hiked cigarette taxes, the result was rampant smuggling—not just from low-tax neighboring states but from military bases. Exports to Mexico were smuggled back into the United States. Last year New York authorities closed down a 21-man smuggling ring that ran $600 million of cigarettes from tax-free Indian reservations. After Canada raised its excise tax, smuggled cigarettes accounted for 40 percent of that nation's consumption. As a result, Canada was forced to greatly lower tobacco taxes in order to control access to cigarettes by children.

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[168] This report in no way promotes the idea that all, or most, publicly enacted taxes are actually in the public interest. To the contrary, "Public Choice" literature has rather decisively shown that legislatures are frequently captured by special interests that use them to obtain wealth transfers which hurt the public. Here, the claim is merely that such transfers must be accomplished through *public* law under our Constitutional design. While in no way a guarantee of good results, our Constitutional structure does at least offer potential victims of rent-seekers, political rights they lack in the judicial system.

[169] Lott & Mustard, *supra* note 31.

B. Prohibition

Prohibition of harmful substances falls squarely within the states' historic police power. A firearms ban would be both unconstitutional and unwise. In the first year after the notorious surrender of legally held handguns in Britain, armed crime *rose* 10 percent. Also in the early 1990s, one-third of gun murders were committed with handguns. Today, that figure has risen to nearly two-thirds. In Canada, a similar phenomenon has followed the banning of handguns.[170]

No constitutional obstacles influence the tobacco debate. However, it is interesting to note that, commercialization of the plant was banned for a short period in the Nineteenth Century by Tennessee. A ban is quintessential public law, of course: tort law is simply not a constitutional means to accomplish this end. Why, then, have states engaged in an extortionary appropriation of tobacco profits as opposed to an outright ban of cigarettes, which clearly are noxious and addictive drug delivery mechanisms? Several answers suggest themselves. The liberal belief that adults should be allowed to indulge in subjective pleasures, even if they entail risks to their health, has conceivably not yet been banished from state houses. The knowledge that black markets would survive any outright ban is surely a relevant consideration. Last but not least, though, the fact is that a ban would financially benefit neither state treasuries nor trial lawyers. Spilling crocodile tears about the suffering of smokers, states and the plaintiffs' bar have consciously engaged in a corrupt and extremely profitable partnership with the tobacco companies they so vehemently denounce.

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[170] L. Gunter, *Confiscating Guns Ineffectual: British Example Proves that Reducing Firearms Does Not Cut Crime*, EDMONTON JOURNAL, January 20, 2000.

C. Collateral Damage

Governments' outrageous quest for money, under the mien of tort suits, has had unmistakable consequences for the rule of law. This is most plainly illustrated in the responses of some states to their own courts' adverse decisions during the tobacco litigation.[171] Florida, followed by Maryland and Vermont, adopted legislation that applies solely to state recoupment suits. This legislation denies defendants the protection of the doctrine of assumption of risk, and that exempts government from any obligation to prove proximate causation. When a government sues in tort, then proceeds to adopt legislation that deprives defendants of their common law defenses to these suits, the rule of law has lost its meaning. What is left is a naked taking of money by government. After a judge threw out Maryland's tobacco lawsuit, Governor Parris Glendening, whose principal campaign contributor is the state's leading tobacco plaintiffs' attorney Peter Angelos, frankly described the reasons for his support of modifications to state law. "Give me three more Peter Angeloses", he said, "and we don't have to worry about the budget."[172] Angelos' lobbying to change state law was far from disinterested: he has requested $1 billion in legal fees for his "services" to the state.

In addition to the havoc government recoupment suits wreak on the rule of law, on basic tort principles like subrogation and proximate causation and on the separation between private and public ordering, another important casualty of these suits lies in the domain of culture wars. We are increasingly witness to the surrender of the principles of individual responsibility, and of *live and let live* freedom, to the forces of public health despotism. There are two kinds of costs that follow: aesthetic and political. As to the former, we shall have mandatory smoke-free environments, in restaurants and in private offices – abrasive, unnecessary, authoritarian impositions on freedom of choice. As to the latter, government recoupment lawsuits emphatically transmit the message that a person's health and safety are not, in important ways, his own affair. There is no role for free contracting in this conception of the "Good Life." Political man has got hold of a new method of control—the public sector will take over functions like health care, providing them for "free", and then will claim that your choice of the way you live your life imposes "externalities" on the public purse. Most incredibly, in a triumph of chutzpah, tort law, the quintessence of *private* ordering, is being used to accomplish this most public of goals—the forfeiture of personal freedom.

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[171] Similar reactions to the recent judgments dismissing the firearm suits are predicted.

[172] Daniel LeDuc & Michael Ruane, *Maryland's Power Player, Orioles Owner, Masters Political Clout*, THE WASHINGTON POST, Mar. 28, 1999, at C1.

D. Conclusion

Proponents of recoupment suits (like Harvard Law Professor Lawrence Tribe) declare that they have been compelled to advocate them because the constitutional process has stymied their efforts to get their desired reforms adopted through more traditional channels. New York Senator Charles Schumer recently expressed the opinion that the courts should transform tort law to achieve public goals, since legislatures are deadlocked "because of the peculiar way in which we elect people to office."[173] What these advocates of the evisceration of tort law mean is that legislatures and electorates have refused to agree with their ideas, that democracy therefore doesn't "work" for them, and that they have decided to have their will enacted by an unelected judiciary. Imagine a defeated President calling on the Army to keep him in power on the grounds that he was only defeated "because of the peculiar way we elect people to office." Such a travesty is fully equivalent to Senator Schumer's recourse to judicial rule.

Where will all this end? Attorney General Reno claims to want to protect "the children." But many more kids are killed playing with matches than playing with guns. And NO ONE dies of tobacco-related disease until they are well into adulthood, according to the best statistics available.

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[173] Summary of testimony, Senate Judiciary Committee Hearings on "Big Government Lawsuits", Nov. 2, 1999, opening statement by Sen. Schumer.

When butterfat attracts health gurus' wrath, will our mayors stalk Cal Ripken? Will they sue bicycle and match industries? If gun manufacturers are responsible for violence, why not sue makers of the steel used in the guns? Why not sue gasoline and knife manufacturers for damages resulting from fume sniffing, arson and stabbing? Why not have the government sue Ford, whose dealers knowingly sell cars some of which are statistically certain to be involved in drunk driving fatalities?

The madness must be stopped before our legal system is irremediably tarnished. To discourage litigation brought primarily to extort money from hapless defendants by "running the meter," legislators should consider a "losers pay" rule for lawyers' fees, especially in civil cases where governments are plaintiffs. Similarly, contingent fee contracts between the government and private attorneys should be banned as unethical. Contingent fees are an invention designed to help poor plaintiffs; our codes of legal ethics express a clear preference for hourly rates when the client can afford them.[174] These two procedural changes are a first step to a reinvigoration of the private law component of torts.

From a longer perspective, we must underscore the requirements of direct damages and of proximate causation. In those cases when tort suits are appropriate, Legislatures must insist that tort subrogees stand in the shoes of their insureds. Most importantly, we must re-emphasize the primacy of contract over tort law and restore the common-law freedom to assume risks (including even the risk of contracting lung cancer).

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[174] *See, e.g.*, NEW YORK EC 2-20, "Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement." *See also* MODEL RULES OF PROFESSIONAL RESPONSIBILITY 1.5 (a); Cal. R. 4-200 (9); Colo. R. 1.05 (c); Tex. R. 1.04(d); Va. DR 2-105 (c).

Tort law is *common* law, built up over hundreds of years of collective wisdom, by accretion and by courts, to deal with disputes between private parties. The common-law rules of tort and contract are necessary foundations for a free society. It is these rules which allow a people to interact, to cooperate and to resolve conflicts with one another without direct state involvement. The common law should not be arrogantly swept away to satisfy politicians' addiction to money.

ATTORNEY GENERAL PRYOR: Let's go eat ribs.

MR. RYCHLAK: I think maybe there's some closing comments.

MR. HEWINS: Yes. Thank you very much General Pryor and Professor Rychlak. Just a couple of closing comments. We've had a lot of interest in this program, as you all know, and that is why you're here. We're going to devote the second book of our 71st volume, I think. It's going to be entirely devoted to this program, and we're going to publish it, and we want to—because of the interest, we want to make it available to a broader range of people or groups than normally receive our books. So outside when you leave today, be sure and watch for a sign-up sheet. You can put your name and your address down, and when we complete the book, we'll send out a letter to everyone or an advertisement of some sort letting you know that the book will be available soon, and if you want to order it, you can do that. So when you go outside look for that. Otherwise, I think it's been a great day. It has exceeded my wildest expectations. Every single panelist had the highest level of knowledge that you could possibly have in this field, and it was just a wonderful experience.

I want to again especially thank Mark Behrens and Mike Hotra. I thanked them at the beginning of the day, but I didn't say much about them, and they weren't there to hear it. I probably logged, between Mark and Mike, probably about fifteen or twenty hours on the phone with the two gentlemen, and truly, just like Mr. Schwartz said, without those two guys, I don't think we could have had this symposium. They did a lot to help out. Bill Jones as well. I think Mark worked with Bill Jones quite a bit to get some of these people from Mississippi to participate. So Bill Jones should be thanked as well. Other than that, that's it. Thank you very much and have a good drive back home.

COMMENT

Mississippi Tort Claims Act: Is Discretionary Immunity Useless?

I. INTRODUCTION

The Mississippi Tort Claims Act (MTCA) was enacted in 1993 to waive the sovereign immunity of the government and its officials.[1] This waiver, however, does not apply to tort liability originating from specified actions listed in the MTCA.[2] For example, sovereign immunity is now waived for money damages up to a specified amount unless the governmental entity's action falls under one of the exemptions provided in the MTCA, including the exemption provided for discretionary actions.[3] If the governmental entity or employee's action falls under one of the statutory exemptions, then, according to the express language of the statute, the entity is entitled to absolute immunity from liability for that action.[4]

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[1] *See* MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 2001). The MTCA provides the exclusive civil remedy against a governmental entity and its employees for acts or omissions which give rise to suit. *Id.* § 11-46-7(1).

[2] See *id.* § 11-46-9 for a list of actions exempted from the waiver.

[3] *Id.* § 11-46-5. "[T]he immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived . . . ." *Id.* Depending upon the date the claim or cause of action arises, the MTCA has set a limitation on the amount of money damages that can be recovered. *Id.* § 11-46-15. Certain circumstances also exist where the governmental entity will remain exempt from liability regardless of the waiver. *Id.* § 11-46-9.

[4] *Id.* § 11-46-9.

Recent Mississippi Supreme Court decisions appear to have eroded the usefulness of the discretionary function exemption.[5] By creating an additional requirement not expressly stated in the statute, the supreme court may have eliminated the discretionary function exemption provided by section 11-46-9(1)(d) of the Mississippi Code.[6] The supreme court now requires that governmental entities demonstrate the same level of ordinary care when carrying out discretionary functions as required by the MTCA when carrying out statutory duties.[7] This new requirement appears to contradict the express language of the MTCA.

This comment will examine the current status of the MTCA with regard to the immunity granted to governmental entities in the exercise of discretionary functions.[8] This comment will argue that the supreme court has combined the requirements of two separate provisions of the MTCA while allowing one to prevail over the other.[9] In order to understand the current state of this immunity, it is necessary to examine case law prior to the enactment of the current MTCA. This comment will compare the history of the exemption for discretionary functions provided in the MTCA to that of other jurisdictions, including the United States Supreme Court's interpretation of the Federal Tort Claims Act (FTCA), and will provide a possible solution to the dilemma the Mississippi Supreme Court may have created.

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[5] *See* Brewer v. Burdette, 97-CA-01016-SCT, ¶ 18, 768 So. 2d 920, 923 (Miss. 2000) (holding school district must still show it used ordinary care in maintenance and repair, despite discretionary nature of those school board functions); L.W. v. McComb Separate Mun. Sch. Dist., 97-CA-01465-SCT, ¶ 27, 754 So. 2d 1136, 1142 (Miss. 1999) (holding obligation imposed by statute "trumps the discretionary exception" even if governmental entity has discretion in carrying out obligation).

[6] *See* MISS. CODE ANN. § 11-46-9(1)(d). Finding that an action is discretionary does not end the inquiry because there must be an inquiry into whether the governmental entity exercised ordinary care. *Brewer*, 97-CA-01016-SCT, ¶ 18, 768 So. 2d at 923.

[7] *Brewer*, 97-CA-01016-SCT, ¶ 18, 768 So. 2d at 923.

[8] The statute granting immunity for discretionary actions of governmental entities states:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, *whether or not the discretion be abused*[.]

MISS. CODE ANN. § 11-46-9(1)(d) (emphasis added).

[9] *Compare id.* § 11-46-9(1)(b), *with id.* § 11-46-9(1)(d). Section 11-46-9(1)(b) states that immunity will be given for actions

> arising out of any act or omission of an employee of a governmental entity exercising *ordinary care* in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation is valid.

II. BACKGROUND OF MISSISSIPPI TORT CLAIMS ACT

For most of the period prior to the passage of the MTCA, the State of Mississippi and its agencies were totally immune from negligent actions when engaging in governmental functions, including proprietary acts.[10] A similar immunity also applied to local school districts.[11] For example, all state and

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Id. § 11-46-9(1)(b) (emphasis added). The discretionary function exception applies "whether or not the discretion is abused." *Id.* § 11-46-9(1)(d); *see supra* notes 7-8. As the express language of the two sections makes clear, in order for a governmental entity to receive immunity when exercising a statutory duty, it must exercise ordinary care, but there is no such requirement when performing a discretionary function.

[10] Miss. Transp. Comm'n v. Rector, 663 So. 2d 601, 602 (Miss. 1995). Immunity for proprietary acts did not extend to municipalities, however. *Rector*, 663 So. 2d at 602. A "government function" has been defined as "activities or services which a municipality is required by state law to engage in and to perform." Anderson v. Jackson Mun. Airport Auth., 419 So. 2d 1010, 1014 (Miss. 1982). A "proprietary act" has been defined as an activity that "while beneficial to the community and very important, [is] not vital to a City's functioning." Morgan v. City of Ruleville, 627 So. 2d 275, 279 (Miss. 1993). Proprietary acts have also been described as "activities in which a municipal corporation engages, not required or imposed upon it by law, about which it is free to perform or not." *Anderson*, 419 So. 2d at 1014. For a more detailed explanation of this topic, see Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitation of Liability*, 68 MISS. L.J. 703, 718-21 (1999). Prior to the enactment of the MTCA, Mississippi courts relied upon the governmental/proprietary function test when determining whether sovereign immunity would apply. City of Tupelo v. Martin, 97-IA-01542-SCT, ¶ 19, 747 So. 2d 822, 828 (Miss. 1999); *see, e.g.*, White v. City of Tupelo, 462 So. 2d 707, 708 (Miss. 1984) (discussing use of governmental/proprietary function test). However, the governmental/proprietary test is no longer applicable except to the extent that it is incorporated in the provisions of the MTCA. *Martin*, 97-IA-01542-SCT, ¶ 19, 747 So. 2d at 828.

[11] *See* Owen T. Palmer, *The History and Future of Sovereign Immunity for*

local government officials and employees were given a qualified immunity until they committed intentional torts or performed ministerial duties where they could be subject to personal liability for their actions.[12] A dramatic change occurred in 1982, when the Mississippi Supreme Court abolished sovereign immunity in *Pruett v. City of Rosedale*.[13] In that case the court found that sovereign immunity is a topic better addressed by the Legislature.[14] In response to *Pruett*, the Mississippi Legislature passed the MTCA.[15]

The MTCA serves in many respects to waive sovereign immunity for money damages up to a specified amount determined by the year the injury occurred.[16] However, there are

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Mississippi School Districts, 58 MISS. L.J. 275, 275 (1988). School districts in Mississippi have enjoyed treatment which follows the theory that "the King can do no wrong." *Id.*

[12] Mohundro v. Alcorn County, 675 So. 2d 848, 853 (Miss. 1996) (quoting Grantham v. Miss. Dep't of Corr., 522 So. 2d 219, 225 (Miss. 1988)). The court defined a "ministerial duty" as "one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependant upon the officer's judgment or discretion." *Mohundro*, 675 So. 2d at 853 (quoting Coplin v. Francis, 631 So. 2d 752, 754 (Miss. 1994)).

[13] 421 So. 2d 1046 (Miss. 1982). The court abolished the doctrine of sovereign immunity as applied to the state and its local subdivisions. *Pruett*, 421 So. 2d at 1052. In fact, the court has recently stated that absolute sovereign immunity has become outdated in the context of modern society and modern legal concepts. *Martin*, 97-IA-01542-SCT, ¶ 34, 747 So. 2d at 830 (McRae, J., dissenting). In Mississippi, state employees enjoyed general immunity until the *Pruett* decision. *See* Palmer, *supra* note 11, at 275. Prior to *Pruett*, the Mississippi Supreme Court had consistently upheld the general immunity for the government from all types of tort action. *Id.* at 275 n.5. Until *Pruett*, Mississippi remained one of a few states that continued to uphold the doctrine of sovereign immunity in its broadest form for school districts. *Id.* at 275-76.

[14] In *Pruett*, the court recognized that sovereign immunity could not be immediately abolished. *Pruett*, 421 So. 2d at 1052. Therefore, the court delayed the effect of the opinion to allow the Legislature to consider any problems that may result from the abolishment of sovereign immunity as it stood at that time. *Id.*

[15] In 1985, the Mississippi Legislature responded to *Pruett* by enacting section 11-46-6, the Mississippi sovereign immunity statute. Grimes v. Pearl River Valley Water Supply Dist., 930 F.2d 441, 443 (5th Cir. 1991). This statute originally provided that claims against governmental entities should be governed by Mississippi case law prior to *Pruett*. *Grimes*, 930 F.2d at 443. Now, citizens can receive compensation from the government for torts committed by governmental entities. *Martin*, 97-IA-01542-SCT, ¶ 36, 747 So. 2d at 830 (McRae, J., dissenting).

[16] *See* MISS. CODE ANN. 11-46-1 to -23 (Supp. 2001). The immunity stands

exceptions to this waiver.[17] The two exceptions applicable to the issue discussed by this comment involve the performance of discretionary functions and statutory duties by the government and its employees.[18] The MTCA expressly states that a governmental entity performing a statutory duty must exercise ordinary care.[19] When performing a discretionary function, however, the governmental entity need only show that the function is truly discretionary in order to gain exemption from the waiver.[20] This comment will examine whether this discretionary function exemption has been diluted or rendered useless by recent Mississippi Supreme Court decisions.

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firm for damages beyond a certain amount as provided in section 11-46-15, unless the governmental entity possesses liability insurance in excess of the appropriate amount. *Martin*, 97-IA-01542-SCT, ¶ 17, 747 So. 2d at 827. At this point, the governmental entity has waived the limit for up to the amount of its insurance coverage. *Id.*

[17] *See* MISS. CODE ANN. § 11-46-9. These exemptions were meant to serve as absolute, jurisdictional defenses. Fraiser, *supra* note 10, at 739. When one of the exemptions is applicable, there is no waiver of sovereign immunity and the governmental entity is still absolutely immune from tort liability. *Id.* Similar exemptions have been held to be absolute in other states as well. *See, e.g.*, Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 7 (Cal. Ct. App. 1975) (holding California police departments have "absolute, not merely discretionary, authority").

[18] *See* MISS. CODE ANN. § 11-46-9(1)(b)(d).

[19] *Id.* § 11-46-9(1)(b). This section states:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [a]rising out of any act or omission of an employee or a governmental entity exercising *ordinary care* in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid[.]

Id. (emphasis added). Mississippi courts have held that "negligence is a failure to exercise due care." Maldonado v. Kelly, 1996-CA-01086-SCT, ¶ 12, 768 So. 2d 906, 911 (Miss. 2000). Ordinary care has been given the same meaning as due care by the Mississippi Supreme Court. Magnolia Constr. Co. v. Miss. Gulf South Eng'rs, Inc., 518 So. 2d 1194, 1202 (Miss. 1988); Consumers Credit Corp. v. Stanford, 194 So. 2d 868, 871-73 (Miss. 1967).

[20] MISS. CODE ANN. § 11-46-9(1)(d). According to the express language of section 11-46-9(1)(d), the governmental entity need only show that the function is truly discretionary. *See supra* note 8.

III. THE DISCRETIONARY FUNCTION EXEMPTION

The discretionary function exemption historically has been one of the most often pled exemptions under the MTCA for the purpose of avoiding governmental liability for negligent acts of government employees.[21] Prior to and following the enactment of the MTCA, the Mississippi Supreme Court labeled numerous actions as discretionary,[22] although the court has recently followed the United States Supreme Court's lead in adopting the public policy function test for defining an action as discretionary.[23] This test requires a determination of whether an act is the result of a policy decision, regardless of whether the act is made at the operational or planning level.[24]

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[21] *See* Fraiser, *supra* note 10, at 771.

[22] Prior to the MTCA, acts held to be discretionary included: a police officer driving in hot pursuit of a fleeing suspect; deciding whether roads, bridges and culverts should be improved or repaired; and deciding where to place stop signs or other traffic devices. *Id.* at 771-72. Activities held to be ministerial included: obtaining and authorizing a search warrant; attempting construction of county road bridges in accordance with statutory specifications; and failing to perform a statutorily mandated duty. *Id.*

[23] *See* Pearl Pub. Sch. Dist. v. Groner, 1999-CA-02027-SCT, ¶ 10, 784 So. 2d 911, 914 (Miss. 2001); Jones v. Miss. Dep't of Transp., 1998-CA-01210-SCT, ¶ 10, 744 So. 2d 256, 260 (Miss. 1999). In applying the public policy function test, the court must determine: "(1) whether the [action] involve[d] an element of judgment or choice, and, if so, (2) whether the choice or judgment involved social, economic or political policy." *Jones*, 1998-CA-01210-SCT, ¶ 18, 744 So. 2d at 262. Previously, the court relied upon the governmental/proprietary function test or the discretionary/ministerial test. *Id.* at 259. Once the court labeled the action discretionary, the inquiry into liability was finished because the governmental entity enjoyed absolute immunity. Poyner v. Gilmore, 158 So. 922, 923 (Miss. 1935). *But see* Brewer v. Burdette, 97-CA-01016-SCT, ¶¶ 18-19, 768 So. 2d 920, 923 (Miss. 2000) (requiring governmental entity to exercise ordinary care when performing discretionary functions). In *Jones*, the court found the placement of traffic control signals to be discretionary; however, the court also found that the governmental entity had a duty to warn of a dangerous intersection if it had notice of the danger. *Jones*, 1998-CA-01210-SCT, ¶ 22, 744 So. 2d at 263.

[24] United States v. Gaubert, 499 U.S. 315, 323 (1991). Other federal courts have held that it must first be determined whether the activity involved an element of choice or judgment and whether the choice involved social, economic or public policy. Gollehon Farming v. United States, 17 F. Supp. 2d 1145, 1154 (D. Mont. 1998). The United States Supreme Court adopted the public policy function test because it recognized the majority of acts in day-to-day operations involved

Congress enacted legislation similar to the MTCA for federal employees in 1946 with the Federal Tort Claims Act (FTCA).[25] Essentially, the FTCA waives sovereign immunity and holds the United States liable for negligent acts of federal employees.[26] One of the main exemptions to this waiver is the immunity provided for governmental employees performing discretionary functions.[27] Early cases decided by the United States Supreme Court interpreted this exemption narrowly by distinguishing between decisions made at the planning level from those decisions made at the operational level.[28]

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some element of discretion. *Jones*, 1998-CA-01210-SCT, ¶ 10, 744 So. 2d at 260.

[25] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.2.3, at 595-96 (3d ed. 1999). The FTCA was passed to combat the perceived injustice caused by sovereign immunity. *Id.* § 9.2.3, at 595. Historically, the only way a citizen injured by the government could collect compensation was to "get a private bill passed through Congress awarding [the] compensation." *Id.*

[26] *See id.* § 9.2.3, at 596. The "United States shall be liable . . . to tort claims . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1994).

[27] CHEMERINSKY, *supra* note 25, § 9.2.3, at 596; *see* 28 U.S.C. § 2680(a) (1994). This section states:

> The provisions of this chapter . . . shall not apply to . . . [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*

Id. (emphasis added).

[28] The FTCA was passed in 1946 because Congress felt the government should be financially responsible for remedying torts committed by its employees. Dalehite v. United States, 346 U.S. 15, 24-25 (1953). The legislative history of the FTCA indicates that Congress meant to waive the government's sovereign immunity unless liability arose from acts of "a governmental nature or function." *Dalehite*, 346 U.S. at 27-28. It was not intended to authorize a suit for damages from a discretionary act even if negligently performed or involving an abuse of that discretion. *Id.* In *Dalehite*, the Supreme Court found the United States was negligent in allowing a cargo ship carrying fertilizer to explode, killing many people and causing millions of dollars in property damage; however, the Court held that the discretionary immunity provision applied because the decisions were made at the planning level rather than at the operational level. *Id.* at 45. *But see* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (holding government liable for failure to exercise due care in maintaining lighthouse even though it was exercise of discretion whether to have lighthouse or not). *See generally* CHEMERINSKY, *supra* note 25, § 9.2.3 (detailing Supreme Court's interpretation of

More recent decisions, however, have given the discretionary function exemption a much broader scope by immunizing any decisions involving an element of judgment or choice.[29]

The FTCA exempts acts of discretion from liability whether or not the discretion was abused.[30] Like the express language of the MTCA, the FTCA exempts discretionary acts without requiring the exercise of ordinary care, although due care must be exercised when performing a statutory duty.[31] The purpose of the exemption is to insulate the federal government from liability that could hamper its ability to operate

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discretionary function immunity).

[29] *See* United States v. Gaubert, 499 U.S. 315, 322 (1991) (holding discretionary function exception applies only to acts that involve "an element of judgment or choice"); Berkovitz v. United States, 486 U.S. 531, 536 (1988) (holding discretionary function exemption immunizes decisions based on public policy). The Court found the government liable in *Berkovitz* because the actions the plaintiffs sued upon did not involve discretion. *Berkovitz*, 486 U.S. at 547. In *Gaubert*, the Court clarified that the discretionary function exception may be available for actions taken beyond the policy or planning level. *Gaubert*, 499 U.S. at 322-23. Even though the government was found liable in *Berkovitz*, both cases represent an expansion of the exception beyond that found in *Indian Towing* because the Court added the elements of judgment and choice to those actions that fall under the exception. *Berkovitz* and *Gaubert* give federal courts a two-part test for determining whether a federal employees' actions will be immunized under the FTCA: (1) the action must involve an element of judgment or choice and (2) the choice must be based on considerations of public policy. CHEMERINSKY, *supra* note 25, § 9.2.3, at 602. The discretionary function exemption to the United State's waiver of sovereign immunity is intended to prevent "second-guessing" of governmental decisions that are discretionary. Boyle v. United Technologies Corp., 487 U.S. 500, 527 (1988) (Brennan, J., dissenting); *see* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (holding government officials performing discretionary functions are immune from liability as long as their conduct does not violate clearly established statutory or constitutional rights).

[30] *Dalehite*, 346 U.S. at 33. "Where there is room for policy judgment and decision there is discretion." *Id.* at 36. In determining the applicability of the discretionary function exemption to the FTCA, the critical inquiry is not whether judgment was exercised but whether the nature of judgment called for policy consideration. Blessing v. United States, 447 F. Supp. 1160, 1177-78 (E.D. Pa. 1978). According to *Blessing*, if the function is discretionary within the meaning of the FTCA's discretionary function exemption, then the courts are without jurisdiction to find liability for that action. *Blessing*, 447 F. Supp. at 1168; *see supra* note 23.

[31] *See supra* notes 7, 27 and accompanying text. Section 2680(a) "broadly exempts from tort liability the execution in due care of a statute or regulation as well as the exercise or performance, whether or not in due care, of any discretionary function or duty." *Blessing*, 447 F. Supp. at 1170.

effectively.[32]

Other jurisdictions with similar acts give guidance through their interpretations of the discretionary function exemption.[33] The Mississippi Legislature patterned the MTCA in part after a similar act in South Carolina.[34] The South Carolina courts hold that the discretionary function exemption "must be construed liberally in favor of limiting the liability" of the governmental entity.[35] Georgia also has enacted a tort claims statute that contains a provision almost identical to the Mississippi version.[36] Although Georgia courts recently handed down opinions narrowly interpreting actions that are considered discretionary, they still uphold absolute immunity when an action is characterized as discretionary.[37]

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[32] *Blessing*, 447 F. Supp. at 1170.

[33] The Tennessee Supreme Court has found governmental entities liable for improperly maintaining intersections because this maintenance was not discretionary. Fretwell v. Chaffin, 652 S.W.2d 755, 757 (Tenn. 1983). This decision did not involve the use of discretion by the officials to erect the disputed traffic signals in the first place. *Fretwell*, 652 S.W.2d at 757. In another case, a Tennessee court found a governmental entity immune from liability for an accident allegedly caused by the timing sequence on a traffic signal. Davis v. City of Cleveland, 709 S.W.2d 613, 615 (Tenn. Ct. App. 1986). The Court held the original setting of the timing sequence was based on judgment and fell under the immunity of discretion. *Davis*, 709 S.W.2d at 615.

[34] *See* Fraiser, *supra* note 10, at 740. Many of the exemptions from section 11-46-9 are identical to the exemptions found in the South Carolina version including the discretionary function exemption and the statutory duty exemption. *Id. Compare* MISS. CODE ANN. § 11-46-9(1)(b), (d) (Supp. 2001), *with* S.C. CODE ANN. § 15-78-60(5) (Law. Co-op. Supp. 2001). By adopting an identical scheme when dealing with discretionary functions, the Mississippi Legislature presumably intended that the discretionary exemption operate in the same manner as South Carolina's. *See* Fraiser, *supra* note 10, at 758.

[35] Rice v. Sch. Dist., 452 S.E.2d 352, 354 (S.C. Ct. App. 1994); *see* Frasier, *supra* note 10, at 740-41. There is a presumption that Mississippi courts should adopt an equally liberal interpretation because the MTCA was modeled after the South Carolina version. Frasier, *supra* note 10, at 740-41.

[36] *See* GA. CODE ANN. § 50-21-24(2) (1998). The Georgia statute states: "The state shall have no liability for losses resulting from . . . [t]he exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused[.]" *Id.*

[37] *See* Fraiser, *supra* note 10, at 780-81. Earlier case law in Georgia made the distinction between ministerial and discretionary acts by holding that a ministeri-

IV. RECENT CASES

The most recent Mississippi case that dilutes the discretionary function exemption is *Brewer v. Burdette*.[38] The plaintiff in this case, Jeremy Brewer, filed a complaint against Pass Christian School District (PCSD) and Anna Burdette for damages resulting from a car crash on October 6, 1996.[39] PCSD filed a motion to dismiss in the trial court, claiming absolute immunity pursuant to section 11-46-9 of the Mississippi Code.[40] The trial court granted the dismissal, and Brewer appealed to the Mississippi Supreme Court.[41]

The issue the court considered was whether the actions of PCSD satisfied the requirements for discretionary function immunity provided in the MTCA.[42] Brewer argued that

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al act is definite and requires the execution of a specific duty, while a discretionary act calls for personal judgment. Joyce v. Von Arsdale, 395 S.E.2d 275, 276 (Ga. Ct. App. 1990). However, later cases have found the definition in *Joyce* to serve only as a guide because the current definition of what actions are discretionary is more narrow. *See* Northwest Ga. Reg'l Hosp. v. Wilkins, 469 S.E.2d 786, 788 (Ga. Ct. App. 1996). Georgia courts have held that whether an act is one furthering government policy is not the issue; the only crucial factor is whether the employee exercised decision-making judgment in the absence of controlling legal standards. Christensen v. State, 464 S.E.2d 14, 18 (Ga. Ct. App. 1995).

[38] 97-CA-01016-SCT, 768 So. 2d 920 (Miss. 2000).

[39] *Brewer*, 97-CA-01016-SCT, ¶ 3, 768 So. 2d at 921. Burdette drove her automobile out of PCSD's parking lot and collided with Brewer's motorcycle. *Id.* ¶ 4, 768 So. 2d at 921. Brewer received extensive injuries including the loss of his right leg, and he is now permanently disabled and disfigured. *Id.*

[40] *Id.* ¶ 5, 768 So. 2d at 921. The MTCA defines a "school district" as a "political subdivision" and a "governmental entity." MISS. CODE ANN. § 11-46-1(g), (i) (Supp. 2001). As a governmental entity, PCSD is entitled to absolute immunity when performing a discretionary function. *Id.* § 11-46-9(1)(d).

[41] *Brewer*, 97-CA-01016-SCT, ¶ 6, 768 So. 2d at 921.

[42] *Id.* ¶¶ 7-8, 768 So. 2d at 921-22. Brewer argued that the allegedly negligent act, the maintenance of the driveway, was a "ministerial" function and should not fall under the discretionary function immunity. *Id.* ¶ 10, 768 So. 2d at 922. However, at least one Mississippi case has stated that a duty should be discretionary if it involves the use of "judgment and discretion in [its] performance." T.M. v. Noblitt, 650 So. 2d 1340, 1343 (Miss. 1995). The Mississippi Supreme Court has recently discussed the discretionary function of governmental entities in more detail in *L.W. v. McComb Separate Municipal School District*, 97-CA-01465-SCT, 754 So. 2d 1136 (Miss. 1999). In *L.W.*, the court held that maintaining a safe environment and properly supervising students are within the

PCSD was liable because, he alleged, obstructions on the school ground negligently created a hazardous and dangerous condition.[43] PCSD argued that all of the allegations of negligence fell within the discretionary function exemption.[44] The court agreed with PCSD that the allegedly negligent actions were discretionary but stated that "characterizing the duty as discretionary alone does not end the inquiry of whether PCSD [had] absolute immunity."[45] The court held that PCSD must also have exercised "ordinary care" in its performance of the discretionary duty.[46] Therefore, the court reversed and remanded the trial court's ruling.[47]

The holding in *Brewer* was based partly upon *Lang v. Bay*

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sphere of a school's discretionary function. *L.W.*, 97-CA-01465-SCT, ¶ 23, 754 So. 2d at 1141. Also at issue in *L.W.* was the school's statutory duty to control the students. *Id.* ¶ 25, 754 So. 2d at 1141-42. The court stated that immunity for such duties or functions will only be granted when that governmental entity exercises ordinary care. *Id.* ¶ 26, 754 So. 2d at 1142. In *L.W.*, a student was sexually assaulted on school grounds, and the court stated that although the school's duty to provide a safe environment was discretionary, the school had a statutory duty to "hold pupils to strict account," which required the exercise of ordinary care for a grant of absolute immunity. *Id.* ¶¶ 26-29, 754 So. 2d at 1142-43. The court held the statutory duty trumped the discretionary function. *Id.* ¶ 27, 754 So. 2d at 1142. Because the school did not take reasonable steps to minimize risks, sovereign immunity was inapplicable as an absolute bar for this ministerial duty. *L.W.*, 97-CA-01465-SCT, ¶ 29, 754 So. 2d at 1143.

[43] *Brewer*, 97-CA-01016-SCT, ¶ 15, 768 So. 2d at 923. The obstructions that obscured the driver's view were a large sign, a hedge, a metal fence, a utility pole and other vegetation. *Id.* ¶ 16, 768 So. 2d at 923. Also, Brewer asserted that failing to have proper warnings, speed signs and other devices to warn motorists of the existence of PCSD's driveway is a dangerous and hazardous condition. *Id.*

[44] *Id.* ¶ 16, 768 So. 2d at 923. The PCSD pointed out that the Mississippi Supreme Court has ruled that "road maintenance and repair are discretionary rather than ministerial functions." Mohundro v. Alcorn County, 675 So. 2d 848, 853 (Miss. 1996). Further, the Mississippi Supreme Court has ruled that "whether or not to erect a barricade or some other type of warning device" was discretionary. *Id.*

[45] *Brewer*, 97-CA-01016-SCT, ¶¶ 17-18, 768 So. 2d at 923.

[46] *Id.* ¶ 18, 768 So. 2d at 923. "It must be determined whether PCSD has exercised ordinary care in both not erecting signs or warnings on the approaches to the driveway and in its construction and maintenance of the parking lot and abutting improvements at the [school]." *Id.*

[47] *Id.* ¶ 21, 768 So. 2d at 923. "The issue of ordinary care is a fact question." *Id.* ¶ 19, 768 So. 2d at 923. The supreme court felt the trial court, confronted with all the relevant facts, should decide whether those responsible used ordinary care as required by the MTCA. *Id.*

St. Louis/Waveland School District,[48] another recent Mississippi Supreme Court case discussing discretionary immunity.[49] In *Lang*, the court held that the school had a non-discretionary statutory duty to discipline its students.[50] Since there was a statutory duty in place, the court relied upon section 11-46-9(1)(b), which requires the exercise of ordinary care, instead of section 11-46-9(1)(d), which gives absolute immunity to all actions involving the use of discretion.[51]

By characterizing the actions giving rise to the suit as ministerial instead of discretionary, the *Lang* opinion is easily distinguishable from *Brewer*. Instead of creating an additional requirement to a provision found in the MTCA, the court in *Lang* properly distinguished the standard applicable for discretionary actions from the standard applicable for statutory duties. Conversely, the *Brewer* court never found PCSD was acting under a statutory duty, but held that the performance of a discretionary duty requires the same standard of care as statutory duties.

V. CONCLUSION

By issuing the *Brewer* opinion, the Mississippi Supreme Court has essentially eliminated the discretionary immunity provision of the MTCA. This immunity is practically worthless since the government must still exercise ordinary care in its performance of discretionary functions.[52] In other words, in order to receive the immunity, the governmental entity must refrain from acting negligently in the first place. While it is true the supreme court was trying to ensure the safety of the public, the court ignores the original purpose behind the discretionary immunity exemption. The immunity was provided to encourage participation in public service by shielding the actors from liability when performing acts of discretion required in the course of public service.[53]

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[48] 97-CA-01612-SCT, 764 So. 2d 1234 (Miss. 1999).

[49] In *Lang*, a student was injured when he fell off a brick wall while trying to avoid an altercation between other students. *Lang*, 97-CA-01612-SCT, ¶¶ 2-3, 764 So. 2d at 1235. The student alleged that the school lacked proper supervision and did not provide a safe environment for the students. *Id.* ¶ 4, 764 So. 2d at 1235.

[50] *Id.* ¶ 29, 764 So. 2d at 1240-41. "[T]he school district's duty to control and discipline students is ministerial not discretionary, and therefore the discretionary exception does not apply." *Id.* ¶ 29, 764 So. 2d at 1241. The student in *Lang* argued that if a duty is statutory, then it is not discretionary under Mississippi law. *Id.* ¶ 22, 764 So. 2d at 1239. The court agreed and held that the school had a statutory duty to "hold pupils to strict account at school." *Id.* ¶ 26, 764 So. 2d at 1240 (citing MISS. CODE ANN. § 37-9-69 (2001)). However, if the school exercises ordinary care in the performance of this statutory duty, it is entitled to absolute immunity. *Lang*, 97-CA-01612-SCT, ¶ 27, 764 So. 2d at 1240.

[51] *Id.* ¶¶ 27-33, 764 So. 2d at 1240-41.

[52] Mississippi courts have held that "negligence is a failure to exercise due

When reviewing a discretionary action, the court has turned the inquiry into nothing more than a simple negligence evaluation by requiring the exercise of ordinary care. Prior to the enactment of the MTCA and the *Pruett* decision, governmental entities in Mississippi enjoyed absolute immunity from all liability.[54] The MTCA has waived this immunity unless the action qualifies as an exemption found in section 11-46-9.[55] The exemptions provided in the MTCA are unambiguous and serve a distinct purpose. Governmental employees will inevitably be required to use discretion when carrying out policies and other actions. The MTCA expressly maintains absolute immunity for incidents occurring from decisions falling under this category.

In the *Brewer* opinion, the court confused the standard by which discretionary actions are judged. The court relied on several previous opinions that held that performance of a statutory duty should be carried out with ordinary care. However, those cases did not deal with the standard that should be applied to discretionary actions. They clearly involved duties mandated by statute. For example, in *L.W. v. McComb Separate Municipal School District*,[56] the court held that a school's statutory duty to hold students "to strict account"

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care." Maldonado v. Kelly, 1999-CA-01086-SCT, ¶ 12, 768 So. 2d 906, 911 (Miss. 2000). Ordinary care has been given the same meaning as due care by the Mississippi Supreme Court. Magnolia Constr. Co. v. Miss. Gulf South Eng'rs, Inc., 518 So. 2d 1194, 1202 (Miss. 1988); Consumers Credit Corp. v. Stanford, 194 So. 2d 868, 871-73 (Miss. 1967); *see supra* note 19.

[53] *See supra* notes 22-24 and accompanying text.

[54] *See supra* note 13 and accompanying text.

[55] *See supra* notes 2, 17, 19 and accompanying text.

[56] 97-CA-01465-SCT, 754 So. 2d 1136 (Miss. 1999).

trumped the discretionary exemption.[57] After *Brewer*, the inquiry into liability appears to be whether the government entity was negligent in the first place. Arguably, it no longer matters whether the action was discretionary or ministerial. When performing a statutory duty, the MTCA expressly states that the government entity must exercise ordinary care, but the *Brewer* court has placed questionable reliance on this directive in applying the same standard to discretionary acts. In some cases, as shown by *Jones v. Mississippi Department of Transportation*,[58] a duty to use ordinary care can also arise when the government entity has notice of a dangerous situation.[59] In *Brewer*, however, the court does not similarly justify its decision by stating that PCSD had any notice of the dangers of the school parking lot, for example.

As argued in the concurring opinion in *Brewer*, the majority failed to fully explain why the actions of PCSD did not fall under the exemptions noted in section 11-46-9.[60] The concurring justice argued that ordinary care should have been exercised by PCSD because it was performing a statutory duty.[61] Therefore, according to the concurring judge, PCSD had a statutory duty to maintain the parking lot and abutting improvements at the school, and whether it performed this duty with ordinary care was a question of fact.[62] The concurring opinion makes a strong point. In order for the exercise of ordinary care in section 11-46-9(1)(b) to apply, the governmental entity must be performing a function mandated by statute. The majority in *Brewer*, however, did not articulate any statutory duty that PCSD failed to follow. It simply held that even when performing discretionary functions, the governmental entity must exercise ordinary care. An action labeled as discretionary meets the statutory requirement for immunity.[63]

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[57] *See supra* note 42.

[58] 1998-CA-01210-SCT, 744 So. 2d 256 (Miss. 1999).

[59] *See supra* note 23 and accompanying text.

[60] Brewer v. Burdette, 97-CA-01016-SCT, ¶ 23, 768 So. 2d 920, 924 (Miss. 2000) (Smith, J., concurring).

[61] *Brewer*, 97-CA-01016-SCT, ¶ 26, 768 So. 2d at 924 (Smith, J., concurring). The concurring judge pointed out that the school has a statutory duty to maintain the school and make necessary improvements. *Id.* (Smith, J., concurring); *see* MISS. CODE ANN. § 37-7-301(d) (2001). Another specified duty the concurring opinion offers is the school board's responsibility "to be the custodians of real and personal school property, and to manage, control and care for same." *Id.* § 37-7-301(c).

[62] *Brewer*, 97-CA-01016-SCT, ¶ 26, 768 So. 2d at 924 (Smith, J., concurring).

In order to cure this contradiction, the court should state more specifically whether the allegedly negligent acts giving rise to the suit are discretionary or are pursuant to a statutory duty. The MTCA expressly states that discretionary functions are to be judged under a different standard than statutory duties. By confusing the requirements for two completely different exemptions within the MTCA, the Mississippi Supreme Court has obscured the standard for sovereign immunity.

In *Brewer*, the court seems to find that the allegedly negligent actions were discretionary, but this is not clear. The court never indicates that PCSD violated any statutory duty. If the action was discretionary, and there was no applicable statutory duty, then the court should have cased its inquiry into liability. The governmental entity should be entitled to absolute immunity. The MTCA expressly provides this immunity whether or not the discretion is abused.[64] If there is a statutory duty in place, the court should determine if ordinary care was exercised in the performance of the statutory duty. When acting pursuant to an affirmative duty, it is proper to require the exercise of ordinary care.

It appears the requirements for immunity under the MTCA have been confused. This problem can be cured if the court articulates its reasoning more clearly when determining whether a governmental entity is immune. When there is a statutory duty involved, the court should express it, and when the action involves discretion, the governmental entity should be immune. One possible solution is for the court to follow the lead of other jurisdictions, such as Georgia, and narrow the types of actions that are considered discretionary. This would serve both the goal of protecting the public and maintaining the immunity that allows public servants to serve the public without fear of reprisal.

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[63] *See supra* note 23.

[64] *See supra* note 8.

Robert F. Walker

RECENT DECISION

Constitutional Law—Judicial Review—Appellate Courts Must Review De Novo the Constitutionality of Punitive Damages Awards

I. FACTS

During the 1980s the Leatherman Tool Group (Leatherman) introduced a multifunction Pocket Survival Tool (PST) which improved on the design of the classic Swiss army knife.[1] Leatherman's PST, with an array of features, dominated the market for multifunction pocket tools.[2] In 1995, however, Cooper Industries (Cooper) designed and began marketing a competing multifunction pocket tool.[3] Cooper marketed the product under the name ToolZall and the product's design was virtually identical to Leatherman's PST. [4]When Cooper introduced the ToolZall in 1996, it used photographs of a modified PST in its marketing materials because the first ToolZalls were not yet complete.[5] In addition to using a modified line drawing of a PST in its international marketing campaign, Cooper created a "mock-up" ToolZall by removing the Leatherman trademark from a PST and adding unique fasteners that Cooper was to use on the ToolZall.[6] Shortly after the introduction of the ToolZall, Leatherman filed suit against Cooper in the United States District Court for the District of Oregon claiming trade-dress infringement, unfair competition, false advertisement under the Lanham Act, 15 U.S.C. § 1125(a) (1998), and a common law claim of unfair competition for advertising and selling an imitation of the PST.[7] After a trial in October 1997, the jury found that Cooper was liable for passing off, false advertising and unfair competition and assessed compensatory damages of $50,000 in favor of Leatherman.[8] The jury also awarded Leatherman punitive damages of $4.5 million.[9] The district court rejected Cooper's arguments that the amount of punitive damages awarded by the jury was grossly excessive and entered judgment in favor of Leatherman.[10] The United States Court of Appeals for the Ninth Circuit affirmed the punitive damages award, holding

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[1] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 427 (2001). Leatherman essentially created the entire market for multifunction pocket tools by designing the Pocket Survival Tool. *Leatherman*, 532 U.S. at 427.

[2] *Id.* The PST included several functional features such as near full-sized unfolding pliers. *Id.*

[3] *Id.* Cooper Industries planned to capture approximately five percent of the multifunction tool market with the competing design. *Id.*

[4] *Id.* The ToolZall included some unremarkable differences from the PST, such as a serrated blade and different fasteners. *Id.* at 427 n.1. . Cooper eventually modified the design of the ToolZall in response to the litigation instigated by Leatherman. *Id.* at 427.

[5] *Id.* at 427. The ToolZall was introduced at the National Hardware Show in

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Chicago, which normally draws an audience of over 70,000 people. *Id.* at 427-28. Cooper included the modified photographs of the PST in its marketing materials and catalogs. *Id.* at 427. Cooper had retouched at least one of the photographs in order to remove evidence of the Leatherman trademark. *Id.* at 4287.

[6] *Leatherman*, 532 U.S. at 428. The line drawing distributed to international sales representatives was produced by photocopying a line-art drawing of a PST and then simply removing the Leatherman trademark. *Id.* at 427 & n.2.

[7] *Id.* at 428. The district court entered a preliminary injunction against Cooper, prohibiting it from marketing the ToolZall and from using pictures of the modified PST in advertising materials. *Id.* In November 1996, Cooper recalled ToolZall promotional materials containing pictures of the modified PST from sales personnel, but the company did not retrieve marketing materials sent to customers until well into 1997. *Id.*

[8] *Id.* at 428-29. With regard to Leatherman's claims under the Lanham Act, the jury found that Leatherman did indeed have trademark rights in the overall appearance of the PST and that Cooper had infringed these rights. *Id.* at 429. However, the jury found that the infringement had not damaged Leatherman. *Id.*

[9] *Id.* at 429. The jury answered a special interrogatory finding that Cooper, by engaging in false advertising, had acted with malice or reckless indifference to Leatherman's rights. *Id.*

[10] *Id.* The district court ordered sixty percent of the punitive damage award paid to the Criminal Injuries Compensation Account of the State of Oregon. *Id.* The judgment also enjoined Cooper from marketing the ToolZall in the United States and twenty two other countries. *Id.*

that the district court "'did not abuse its discretion in declining to reduce the amount of punitive damages.'"[11] The United States Supreme Court granted certiorari and held: vacated and remanded.[12] Since awards of punitive damages are not facts found by the jury, the issue of constitutional excessiveness warrants de novo review.[13]

II. RELATED LAW

A. *Constitutionality of Punitive Damages*

The Supreme Court addressed the issue of appellate review of awards of punitive damages as well as the implications of the Eight Amendment's Excessive Fines Clause in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*[14] In *Browning-Ferris*, the defendant in an antitrust suit appealed a jury verdict awarding the plaintiff $6 million in punitive damages claiming that the award was, among other things, violative of the Eight Amendment's Excessive Fines Clause.[15] The

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[11] *Leatherman*, 532 U.S. at 430. In the Ninth Circuit's published opinion, the court set aside the injunction precluding Cooper from marketing the ToolZall, holding that the overall appearance of the PST was not protected under applicable trademark laws, since the distinguishing features of the ToolZall were functional. *Id.* at 429-30. The Ninth Circuit, reviewing the district court's determination under the abuse of discretion standard, affirmed the award of punitive damages, holding that the Oregon Constitution did not preclude such an award and that the award was not violative of Cooper's due process rights under the United States Constitution. *Id.* at 430.

[12] *Id.* at 443. The Court decided Leatherman with a majority of eight justices to one. *Id.* at 425.

[13] *Id.* at 436. The Court noted that, unlike awards of compensatory damages, punitive damages do not present issues of historical fact. *Id.* at 437. Further, the Court noted confusion among the courts of appeals regarding the appropriate standard of appellate review for punitive damage awards. *Id.* at 431.

[14] 492 U.S. 257 (1989).

[15] *Browning-Ferris*, 492 U.S. at 262. The Eight Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed." U.S. CONST. amend. VIII. The defendant also claimed that the award of punitive damages violated the Due Process Clause. *Browning-Ferris*, 492 U.S. at 260 n.1. The Court noted that due process may place limits on damage awards but refused to address the issue, stating that the petitioners had failed to raise the claim in the courts below and in the petition for certiorari. *Id.* at 277; *see* U.S. CONST. amend. XIV (prohibiting deprivation of property "without due process of law"). The Supreme Court was confronted with a claim that a state's standards for reviewing

Court held that the Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.[16] The Court further stated that the appellate court had not erred in holding that the trial court had not abused its discretion in denying a remittitur on the issue of punitive damages.[17] The Court reasoned that there was no federal

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punitive damage awards were violative of the Due Process Clause in 1986. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986). The *Lavoie* Court stated that the due process arguments were indeed important, but found it unnecessary to address the issue and decided the case on other grounds. *Lavoie*, 475 U.S. at 828-29.

[16] *Browning-Ferris,* 492 U.S. at 260. The appellate court held that even if the Excessive Fines Clause was applicable, the award would not be unconstitutional. *Id.* at 262. The Court, however, stated that past cases seemed to limit the application of the clause to criminal cases. *Id.*; *see* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (stating that Excessive Fines Clause was intended to protect persons convicted of crimes); *Ex parte* Watkins, 32 U.S. (7 Pet.) 568, 573-74 (1833) (stating that Eight Amendment is addressed to courts exercising criminal jurisdiction). The Court addressed the appropriate standard of appellate review for a constitutional challenge of excessiveness under the Eight Amendment's Excessive Fines Clause in 1998. United States v. Bajakajian, 524 U.S. 321, 337 n.10 (holding that determination of whether fine is constitutionally excessive requires de novo review). In *Bajakajian*, the Court noted that a judicial determination that a punishment, rather than compensation, is excessive is "inherently imprecise" and rejected arguments that the issue should be reviewed for abuse of discretion. *Bajakajian*, 524 U.S. at 336-37. Black's Law Dictionary defines appeal de novo as review by an appellate court without deference to the trial court's rulings. BLACK'S LAW DICTIONARY 94 (7th ed. 1999). The abuse of discretion standard of review is defined as appellate review for errors that are grossly unsound, unreasonable or illegal. *Id.* at 10; *see* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (explaining that trial court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence").

[17] *Browning-Ferris*, 492 U.S. at 279. The Court stated that the trial court should review the jury verdict and determine whether it was within the confines of state law. *Id.* Left with an excessiveness challenge resting only on state law, as the due process claim had not been properly preserved, the Court supported review under the abuse of discretion standard. *Id.*; *cf.* Donald B. Petrie, Comment, *Punitive Damages and the Constitution After* Browning-Ferris Industries v. Kelco Disposal, Inc., 22 ARIZ. ST. L.J. 739, 740 (1990) (observing that *Browning-Ferris* "left the door open" for future restraints on punitive damages). The Court acknowledged that it had never expressly held that the Seventh Amendment allowed appellate review of damage awards. *Browning-Ferris*, 492 U.S. at 279 n.25. However, the *Browning-Ferris* Court found it unnecessary to address the issue. *Id.* The Court addressed the issue of the implications of the Seventh Amendment on appellate review of jury awards of compensatory damages in 1996. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 419 (1996). In *Gasperini*, the

common law standard for determining the excessiveness of an award of punitive damages and that the Excessive Fines Clause applied only to fines levied by the government.[18]

B. Procedural Due Process Limitations on Punitive Damages Awards

The Supreme Court addressed the issue of due process limitations on awards of punitive damages in *Pacific Mutual Life Insurance Co. v. Haslip.*[19] In *Haslip*, an insurance agent employed by Pacific Mutual sold group health and life insurance policies to an Alabama municipality.[20] However, after

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Court held that a New York law would not violate the Reexamination Clause of the Seventh Amendment if appellate courts reviewed district court determinations under the abuse of discretion standard. *Gasperini*, 518 U.S. at 419. However, Justice Scalia noted that while compensatory damages presented a question of fact, punitive damages do not represent facts found by the jury. *Id.* at 459 (Scalia, J., dissenting); *cf.* St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915) (noting that compensatory damages represent factual findings).

[18] *Browning-Ferris*, 492 U.S. at 276-79. The petitioners argued for the establishment of a common law standard of excessiveness based on proportionality between compensatory and punitive damages. *Id.* at 279. The Court stated that adopting such a standard of excessiveness would blur the distinction between state and federal law. *Id.* The Court thus concluded that appellate courts were correct in applying an abuse of discretion standard of review when reviewing excessiveness challenges based on state law. *Id.* at 280.

However, the Court addressed the question of the appropriate standard of appellate review for the constitutional issue of probable cause in 1996. Ornelas v. United States, 517 U.S. 690, 691 (1996). In *Ornelas*, criminal defendants claimed that a warrantless search of their vehicle violated the Fourth Amendment. *Ornelas*, 517 U.S. at 693. The appellate court applied a deferential standard of review and ultimately affirmed the trial court's findings of probable cause and reasonable suspicion. *Id.* at 694-95. The Supreme Court held that determinations of probable cause must be reviewed de novo, noting that de novo review allowed appellate courts to clarify and maintain control over the law. *Id.* at 697. The *Ornelas* Court further stated that de novo review was "necessary to stabilize and unify precedent. *Id.* at 697-98. However, the Court pointed out that findings of historical fact must be reviewed under the clearly erroneous standard. *Id.* at 699. *See generally* Richard H. W. Maloy, *"Standards of Review" Just A Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 619 (2000) (detailing clearly erroneous standard of review).

[19] 499 U.S. 1 (1991).

[20] *Haslip*, 499 U.S. at 4. The insurance agent was a licensed agent for both Pacific Mutual Life Insurance Company and Union Fidelity Life Insurance Company. *Id.* The agent proposed to obtain health insurance from Union Fidelity and life insurance from Pacific Mutual for the employees of Roosevelt City. *Id.* The

receiving the premium payments for the health insurance coverage from the city employees, the agent misappropriated the funds, rather than remitting payment to the health insurance company.[21] The respondents incurred medical bills after their coverage had lapsed and they brought suit against both the insurance agent and Pacific Mutual.[22] The petitioners appealed the award of punitive damages as violative of due process.[23] The Supreme Court held that the common law method for evaluating punitive damages was not per se unconstitutional and that the award of punitive damages did not violate the petitioner's due process rights.[24] The Court rea-

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Court stated that such packaging of health and life insurance was not uncommon and that such arrangements often stimulated sales of policies. *Id.* at 4-5. The jury found that the agent was acting as an employee of Pacific Mutual and the Supreme Court held that the record amply supported this finding. *Id.* at 13. The Court also stated that imposing liability for punitive damages on Pacific Mutual under the doctrine of respondeat superior was not violative of due process. *Haslip*, 499 U.S. at 15. *See* Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 115 (1927) (holding that liability under respondeat superior for willful torts does not violate due process); Richard B. Graves III, Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination Punitive Damages And Vicarious Liability*, 65 TUL. L. REV. 395, 407 (1990) (noting that majority of jurisdictions extend vicarious liability to punitive as well as compensatory damages).

[21] *Haslip*, 499 U.S. at 5. The arrangement called for the insurance agent to receive the employees' premium payments and to make payment to Union Fidelity for health insurance coverage. *Id.* The agent failed to make payment to Union Fidelity and the respondent's health insurance coverage lapsed. *Id.* The trial court found that the respondent was unaware that her health insurance policy had been canceled. *Id.*

[22] *Id.* at 5. Haslip, a city employee, incurred medical bills after her coverage was cancelled and her account was turned over to a collection agency. *Id.* The collection agency obtained a judgment against Haslip and her credit was adversely affected. *Id.*

[23] *Id.* at 7. The jury awarded petitioner Haslip a general verdict of $1,040,000. *Id.* at 6. As the petitioner had requested $200,000 in compensatory damages, the Court acknowledged that the verdict represented a punitive damages award of $840,000. *Id.* at 6 n.2. The Court noted that the award of punitive damages was more than four times the amount of the respondent's compensatory damages. *Id.* at 23. The Court stated that this differential was close to the line but held that the award "does not cross the line into the area of constitutional impropriety." *Haslip*, 499 U.S. at 23-24. *See generally* J. Mark Hart, *The Constitutionality of Punitive Damages:* Pacific Mutual Life Insurance Co. v. Haslip, 21 CUMB. L. REV. 585, 602 (1991) (arguing that Court's decision has produced ambiguous results).

[24] *Haslip*, 499 U.S. at 17-19. The Court stated that awards of punitive damag-

soned that the jury instructions given in the case and the appellate review conducted by the Alabama Supreme Court sufficiently ensured that the award of punitive damages was not excessive.[25]

C. Constitutional Review of Punitive Damages Awards

The Court addressed claims that an award of punitive damages was both grossly excessive and that the award was the product of fundamentally unfair procedure in *TXO Production Corp. v. Alliance Resources Corp.*[26] . In *TXO*, the petitioner was the assignee of a leasehold title to a tract of miner-

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es are not a new development to tort law and that the imposition of punitive damages has historically been allowed. *Id.* at 15; *see* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984) (noting that "punitive damages have long been a part of traditional state tort law"). Additionally, the Court stated that the common law method for accessing punitive damages was established before the Fourteenth Amendment was enacted and that nothing in the Due Process Clause demonstrates a desire to abrogate the common law method. *Haslip*, 499 U.S. at 17-18; *see* Snyder v. Mass., 291 U.S. 97, 111 (1934) (stating that "Fourteenth Amendment has not displaced the procedure of the ages"). However, the Court expressed concern over punitive damages that "run wild" and stated that the long history of punitive damages alone does not immunize such awards from constitutional scrutiny. *Haslip*, 499 U.S. at 18; *see* Williams v. Illinois, 399 U.S. 235, 239 (1970) (noting that custom alone does not render common practice constitutional).

[25] *Haslip*, 499 U.S. at 20. The jury instructions informed the jury that the purposes of an award of punitive damages were both to punish and to make an example of the defendant. *Id.* at 6 n.2. Further, the trial court's instructions directed the jury to consider the degree of the wrong committed by the defendant and the necessity of preventing similar wrongs in fixing an amount of punitive damages. *Id.* The Court stated that the jury instructions did allow considerable discretion in awarding punitive damages, but that the jury was sufficiently constrained. *Id.* at 19. Next, the Court noted that the award of punitive damages was subject to post-verdict appellate review by the Alabama Supreme Court and that this review acted as an additional check on the jury's assessment. *Id.* at 20. Though the Court did not articulate the standard of appellate review applied, the Court stated that the appellate court considered several factors in determining whether or not the award of punitive damages was excessive. *Haslip*, 499 U.S. at 21-22; *see* Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989) (explaining factors used to determine excessiveness of punitive damages award). The Court stressed that appellate review of the punitive damages award ensured that the award was not grossly out of proportion to the severity of the offense committed and that the award had some relationship to compensatory damages. *Haslip*, 499 U.S. at 22.

[26] 509 U.S. 443 (1993).

al rich land and had agreed to pay twenty-two percent of the oil and gas revenues in royalties to the respondent.[27] However, in an effort to reduce the royalty arrangement with Alliance, the petitioner attempted to create a cloud on the respondent's title to the land.[28] In the slander of title action that ensued the jury awarded the respondent $19,000 in compensatory damages and $10 million in punitive damages and TXO appealed.[29] The Supreme Court held that the award of punitive damages was not grossly excessive and that the procedure employed in reviewing the award was not violative of

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[27] *TXO*, 509 U.S. at 447-48. Alliance was the assignee of a leasehold interest in a parcel of land known as the Belvins Tract. *Id.* at 447. After TXO employees found that recovering oil and gas from the land would be profitable, TXO approached Alliance and offered $20 per acre and twenty-two percent of revenues in royalties in return for Alliance assigning its interest in the land to TXO. *Id.* at 447-48. Shortly after the agreement was signed, TXO discovered a 1958 deed conveying the right to mine coal on the land, but clearly reserving oil and gas rights. *Id.* at 448.

[28] *Id.* at 449. After obtaining a quitclaim deed from the current owner of the coal mining rights, TXO advised Alliance that there was a title objection and attempted to renegotiate the royalty agreement. *Id.* When the negotiations failed, TXO sought a declaratory judgment in an effort to reduce the royalty payments due to Alliance. *Id.* The lower court found that TXO "knowingly and intentionally brought a frivolous declaratory judgment action." *Id.*; *see* Misco Leasing, Inc. v. Keller, 490 F.2d 545, 549 (10th Cir. 1974) (allowing award of punitive damages in slander of title action when defendant acted maliciously). *See generally* Timothy S. Lykowski, Note, *Tightening the Constitutional Noose Around Punitive Damages Challenges:* TXO, *What it Means, And Suggestions That Address Remaining Concerns*, 68 S. CAL. L. REV. 203, 223 (1994) (noting that deterrence and retribution are common justifications for punitive damages awards).

[29] *TXO*, 509 U.S. at 451. The Court stated that the award of compensatory damages was based on Alliance's cost of defending the frivolous declaratory judgment action. *Id.* TXO argued that the award of punitive damages was so excessive that it should be deemed an arbitrary deprivation of property in violation of due process. *Id.* at 453; *see* Southwestern Tel. & Tel. v. Danaher, 238 U.S. 482, 491 (1915) (holding penalty to be so arbitrary as to constitute deprivation of property without due process of law). TXO further argued that the punitive damages award should be subject to heightened judicial scrutiny. *TXO*, 509 U.S. at 455. Specifically, TXO argued that the Court should apply objective criteria in determining if the award of punitive damages violated due process. *Id.* at 455-56. In contrast, the respondent argued that the award of punitive damages should be subjected to only rational basis scrutiny. *Id.* However, the Court rejected each party's proposal for formulating a test to determine whether an award is grossly excessive. *Id.* at 456. The Court noted that, while a bright line formula fails to answer the constitutional inquiry, the general reasonableness of the award must be considered. *Id.* at 458.

TXO's due process rights.[30] The Court reasoned that the award was reasonable in light of the potential harm that the petitioner's conduct could have caused.[31] The Court further stated that the award was not the product of fundamentally unfair procedures.[32]

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[30] *TXO*, 509 U.S. at 462. In evaluating the claimed excessiveness of the punitive damages award the Court reiterated the holding in *Haslip*, stating that the reasonableness of the award must be considered. *Id.* at 458. Additionally, TXO claimed that the award was the product of the admission of improper evidence demonstrating its prior misconduct and evidence of its financial worth. *Id.* at 462 n.28. The Court stated that factors such as these are typically used in accessing punitive damages and noted that the Court in *Haslip* approved their use. *Id.*; *see* United States v. Big D Enter., Inc., 184 F.3d 924, 932 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000) (allowing evidence of defendant's financial worth in accessing punitive damages); Fury Imp., Inc. v. Shakespeare Co., 554 F.2d 1376, 1389 (5th Cir. 1977) (holding that wealth of defendant may be considered in determining punitive damages); *see also* RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977) (stating that "the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person").

[31] *TXO*, 509 U.S. at 462. The Court noted that the award of punitive damages was 526 times the amount of the compensatory damages. *Id.* at 453. However, the Court stated that the award should be considered in light of the potential harm that the scheme could have caused. *Id.* at 460. The lower court found that TXO's conduct could have potentially caused millions of dollars in damages to other victims. *Id.* at 460-61. The Court stated that the award did not "jar one's constitutional sensibilities" when considered in light of the potential loss to the respondents. *Id.* at 462. *See generally* Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1014 (1999) (arguing that punitive damages awards must remain large enough to effectively serve their deterrent function).

[32] *TXO*, 509 U.S. at 463-64. TXO argued that the jury was not properly instructed and that neither the trial court nor the appellate court adequately reviewed the award. *Id.* at 462-63. The Court refused to consider TXO's argument concerning jury instructions since the issue was not raised in the state appellate court. *Id.* at 464. Furthermore, although the Court did not explain what standard of review was employed, the Court held that the appellate court sufficiently reviewed the award in light of rules announced in *Haslip*. *Id.* at 465. Additionally, TXO claimed that it did not have notice that such an award of punitive damages could be levied. *Id.* at 465. The Court held that the notice component of the Due Process Clause was satisfied because prior law indicated that such an award of punitive damages could be imposed. *TXO*, 509 U.S. at 465-66.

D. Substantive Due Process Limits Punitive Damages Awards

The Supreme Court addressed the issue of substantive due process limitations on awards of punitive damages in *BMW of North America, Inc. v. Gore.*[33] In *Gore*, a distributor of automobiles failed to disclose that it had repainted a vehicle damaged by acid rain and sold the vehicle to the respondent as new.[34] The jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages.[35] The Supreme Court held that the award of punitive damages was grossly excessive and violated the Due Process Clause.[36] The

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[33] 517 U.S. 559 (1996).

[34] *Gore,* 517 U.S. at 563. The petitioner repainted the top, hood and trunk of respondent's car due to damage that the vehicle sustained in transit from Germany. *Id.* at 563 n.1. The distributor's policy at that time was to repair cars and sell them as new if the cost of repairing the vehicle was less than three percent of the suggested retail price. *Id.* at 564. In the respondent's case, repairing his vehicle amounted to approximately 1.5 percent of the suggested retail price. *Id.* *See generally* Bruce J. Mckee, *The Implications of* BMW v. Gore *for Future Punitive Damages Litigation: Observations From A Participant*, 48 ALA. L. REV. 175, 176 (1996) (reviewing recent punitive damages decisions).

[35] *Gore*, 571 U.S. at 565. The Court noted that the punitive damages award was 500 times the compensatory damages awarded. *Id.* at 582. The Court conceded that no mathematical bright line could be drawn and stated that the general reasonableness of the punitive damage award must be considered. *Id.* at 582; *see, e.g.*, EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1249 (10th Cir. 1999) (noting that ratio between punitive and compensatory damages alone does not require reduction); Kimbrough v. Loma Linda Dev., Inc., 183 F.3d 782, 785 (8th Cir. 1999) (considering reprehensibility of conduct in upholding punitive damages award that was ten times compensatory damages award).

[36] *Gore*, 517 U.S. at 574. The Court agreed that States may impose punitive damages in the interest of punishing and deterring unlawful conduct. *Id.* at 568; *cf.* Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (stating that punitive damages based on conduct of defendant rather than compensation to plaintiff may be awarded). However, the Court stated that an award of punitive damages violates the Due Process Clause if it may be characterized as grossly excessive. *Gore,* 517 U.S. at 568; *see* Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring) (noting that standardless discretion in granting punitive damages appears inconsistent with due process).The Court previously held that the Due Process Clause required some level of meaningful judicial review of the size of punitive damage awards in 1994. Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994). In *Oberg*, Oregon courts had interpreted a state constitutional provision substantially prohibiting the reviewing of findings of fact as applicable to awards of punitive damages. *Oberg*, 512 U.S. at 418; *see* OR. CONST. art. VII, § 3 (prohibiting appellate review of facts tried by jury); Van Lom v.

Court reasoned that the punitive damages award should be considered in light of several factors: 1) the reprehensibility of the defendant's conduct; 2) the disparity between the award and the harm or potential harm suffered by the plaintiff; and 3) the difference between the award and penalties levied in similar cases.[37]

III. *COOPER INDUSTRIES, INC. V. LEATHERMAN TOOL GROUP, INC.*

A. *Opinion of the Court*

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[38] the Supreme Court held that appellate courts must review district court determinations of the constitutionality of punitive damage awards under a de novo standard, rather than abuse of discretion.[39] The Court immediately noted that

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Schneiderman, 210 P.2d 461, 467 (Or. 1949) (holding that Oregon courts lacked power to set aside excessive damage awards). The Court held that this provision, as applied, violated the Due Process Clause and that awards of punitive damages must be subject to judicial review. *Oberg*, 512 U.S. at 432. However, the *Oberg* Court noted that the case did not present the issue of what standard of review was constitutionally required. *Id.* at 432 n.10. *See generally* Alan Howard Scheiner, Note, *Judicial Assessments of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 184 (1991) (arguing that appellate review of jury awards is limited by Seventh Amendment).

[37] *Gore*, 517 U.S. at 574-75. The Court noted that the most important of these guideposts is the degree of the reprehensibility of the defendant's conduct. *Id.* at 575. The Court engaged in an independent review of each guidepost and concluded that petitioner did not have fair notice that its conduct would subject it to such severe punishment. *Id.* at 574-75; *cf.* Shaffer v. Heitner, 433 U.S. 186, 217 (1977) (Stevens, J., concurring) (noting that Due Process Clause affords protection from judgments without notice). The Court also noted that the award of punitive damages imposed in this case was substantially greater than other civil fines and penalties available for similar misconduct. *Gore*, 517 U.S. at 583-84; *see* Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446, 468 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000) (considering applicable civil penalties in reducing punitive damages award). In *EBI* the Third Circuit refused to apply a highly deferential standard of review to the trial court's determinations concerning punitive damages. *EBI*, 181 F.3d at 469. The *EBI* court further noted that the Supreme Court's punitive damages jurisprudence "counsels intensive review." *Id.* at 470.

[38] 532 U.S. 424 (2001).

[39] *Leatherman*, 532 U.S. at 431. Justice Stevens delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter,

while the same decision maker often simultaneously awarded both punitive and compensatory damages, the separate awards serve distinct identifiable purposes.[40] The Court agreed that the States indeed have discretion in the punishment of tortfeasors, but stated that the Due Process Clause places substantive limits on awards of punitive damages.[41] The Court then addressed the issue of the appropriate standard of appellate review for the constitutionality of punitive damage awards.[42]

The Court stated that in determining whether a punishment is grossly excessive it has repeatedly focused on the degree of the reprehensibility of the defendant's conduct, the relationship between the punishment, and the harm the conduct caused and the penalties imposed for comparable conduct in similar cases.[43] More importantly, the Court noted that in each case of reviewing whether or not a punishment was grossly excessive and unconstitutional it had independently examined each of the criteria.[44] The Court found that, unlike

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Thomas, and Breyer joined. *Id.* at 425-26. The Court stated that the proposed concept of heightened judicial scrutiny for reviewing punitive damages awards that was rejected in *TXO* dealt only with the substantive standard for evaluating excessiveness. *Id.* at 431 n.4. Since *Gore* articulated the substantive standard for reviewing an excessiveness challenge, the Court found the rejection of heightened scrutiny in *TXO* irrelevant to the issue of the appropriate standard of appellate review. *Id.*

[40] *Id.* at 432. The Court stated that while compensatory damages are intended to compensate a plaintiff's loss, punitive damages operate as fines and are intended to punish a defendant for wrongful conduct and to deter future misconduct. *Id.*

[41] *Id.* at 433-34. The Court noted that several states have enacted legislation that limits awards of punitive damages. *Id.* at 433 n.6. The Court stated that even with the states' broad discretionary power in awarding punitive damages, awards must conform to the mandates of the Due Process Clause. *Id.* at 433. The Court stressed that the Due Process Clause prohibits awards of punitive damages that are grossly excessive. *Id.* at 433.

[42] *Id.* at 436. The Court conceded that, when no constitutional issue is presented, federal appellate courts review district court determinations for abuse of discretion. *Id.* at 433.

[43] *Id.* at 434-35. The Court stated that in *Gore*, it had articulated these three criteria as a means of evaluating the consistency of a punitive damages award with due process. *Id.* at 440. The Court noted that a bright line mathematical formula was insufficient in making the determination of gross excessiveness under these criteria. *Id.* at 434-35. The Court also acknowledged that the constitutional determination is "inherently imprecise." *Id.* at 434.

[44] *Leatherman*, 532 U.S. at 435. The Court stated that in that in both

awards of compensatory damages, punitive damage awards are not truly questions of fact tried by the jury.[45]

The Court further explained that the role played by appellate courts, compared to that of trial courts, supports de novo review of the constitutional determination of excessiveness. [46]The Court conceded that, with regard to the guideposts for determining the constitutionality of awards of punitive damages, trial courts were perhaps in better position to determine the reprehensibility of a defendant's conduct.[47] However, the Court stated that appellate courts are in better position to compare an award of punitive damages to other civil penalties levied in comparable cases.[48] Finally, after engaging in an independent review of the award at issue, the Court found the award of punitive damages to be questionable in several respects.[49]

Bajakajian (challenging excessiveness under Eighth Amendment) and in *Ornelas* (regarding probable cause) it had independently reviewed the relevant criteria in making the constitutional determination. *Id.* at 435-36. The Court noted that in each of the prior cases it had endorsed de novo review. *Id.*

[45] *Id.* at 437. The Court stated that de novo review would not be contrary to the Reexamination Clause of the Seventh Amendment since the level of punitive damages awarded by a jury does not constitute a finding of fact. *Id.* However, the Court stated that appellate courts should defer to a trial court's findings of fact. *Id.* at 440 n.14. In this regard, the Court expressed no opinion on whether *Gasperini* would control appellate review if state law more tightly linked punitive damages awards to compensatory damages found by the jury, such as in the case of treble damages. *Id.* at 440 n.13. The Court defended *Oberg* by stating that it was the Oregon Supreme Court's interpretation of the State Constitution that treated awards of punitive damages as findings of fact and not its own. *Leatherman*, 532 U.S. at 437 n.10.

[46] *Id.* at 440. The Court stated that considerations of the vantage points of appellate courts and trial courts failed to tip the balance in favor of a deferential standard of appellate review. *Id.* The Court argued that trial courts were better situated in evaluating only the first of the three guideposts from *Gore*. *Id.*

[47] *Id.* The Court stated that trial courts might have a "somewhat superior vantage" over appellate courts in determining the reprehensibility of a defendant's conduct because of questions such as witness credibility and demeanor. *Id.* The Court further stated that trial courts and appellate courts are equally situated in analyzing the disparity between the harm or potential harm suffered and the punitive damages award. *Id.*

[48] *Id.* The Court stated that comparing the difference between a punitive damages award and similar penalties imposed in comparable cases involves a broad legal comparison and appears more suited for appellate courts. *Id.*

[49] *Leatherman*, 532 U.S. at 441. The Court first stated that Cooper's copying

B. *Justice Thomas' Concurring Opinion*

Justice Thomas rejected the idea that the Constitution places substantive limits on the size of punitive damages awards.[50] However, Justice Thomas agreed with Court in deciding the appropriate standard of appellate review for reviewing a trial court's determination of excessiveness.[51]

C. *Justice Scalia's Concurring Opinion*

Justice Scalia argued that an excessive award of punitive damages does not violate the Due Process Clause.[52] Further, Justice Scalia asserted that determinations of fact-bound constitutional issues should be reviewed under the abuse of discretion standard, rather than de novo.[53] However, given the earlier precedent speaking to the question of the appropriate

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of the functional features of the PST was lawful and should not be considered in accessing punitive damages. *Id.* Next, the Court expressed doubt as to whether the potential harm used in comparison to the award could rightfully include all of Cooper's gross profits for a five-year period. *Id.* at 441-42. The Court noted that it was unlikely that Cooper's misconduct in copying the PST was the cause of its entire five-year sales volume. *Id.* at 441. Finally, the Court stated that the award of punitive damages is likely out of line with other similar civil penalties, as Cooper's misconduct would probably not have subjected it to a multi-million dollar fine. *Id.* at 441. However, the Court noted that the standard of appellate review applied to determinations of excessiveness will probably affect only a few cases. *Leatherman*, 532 U.S. at 441.

[50] *Id.* at 443 (Thomas, J., concurring). Justice Thomas stated that, given the opportunity, he would vote to overrule the Court's decision in *Gore*. *Id.* (Thomas, J., concurring).

[51] *Id.* (Thomas, J., concurring). Justice Thomas noted that this case did not present the issue of the limitations of substantive due process on punitive damages awards, but rather only addressed the appropriate standard of appellate review for a trial court's determination on a challenge of excessiveness. *Id.* (Thomas, J., concurring). Justice Thomas agreed with the Court that such a determination should be reviewed de novo. *Id.* (Thomas, J., concurring).

[52] *Id.* (Scalia, J., concurring). Justice Scalia noted, however, that the Court has held that excessive awards of punitive damages violate the Due Process Clause. *Id.* (Scalia, J., concurring).

[53] *Id.* at 443-44 (Scalia, J., concurring). Justice Scalia noted that in both *Ornelas* and *Bajakajian* he endorsed appellate review under the abuse of discretion standard rather than de novo review. *Id.* at 444 (Scalia, J., concurring).

standard of review, Justice Scalia concurred in the judgment of the Court.[54]

D. Justice Ginsburg's Dissent

Justice Ginsburg argued that the majority should have held that determinations of constitutional excessiveness should be subject to review for abuse of discretion.[55] Justice Ginsburg explained that awards of punitive damages are highly dependent on findings of fact and noted that responsibility for such factfinding must be left with trial courts.[56] Justice Ginsburg stated that the Court's precedent suggested that appellate courts should review the constitutionality of punitive damages awards under the abuse of discretion standard.[57] Justice Ginsburg argued that district courts are more properly situated to evaluate the constitutionality of punitive damages awards.[58] Finally, Justice Ginsburg noted that the rule announced by the Court involved a more complex analysis, as appellate courts will be required to separate out and defer to findings of fact when evaluating punitive damages awards.[59]

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[54] *Leatherman*, 532 U.S. at 444 (Scalia, J., concurring). Justice Scalia noted that, since the Court had decided against abuse of discretion review in both *Ornelas* and *Bajakajian*, de novo review best conformed to precedent. *Id.* (Scalia, J., concurring).

[55] *Id.* at 444 (Ginsburg, J., dissenting). Justice Ginsburg explained that juries have historically determined the amount of punitive damages awards. *Id.* at 444-45 (Ginsburg, J., dissenting).

[56] *Id.* at 444-45 (Ginsburg, J., dissenting). Justice Ginsburg conceded, however, that an award of punitive damages involves more than determinations of historical fact, but argued that the determination is fundamentally dependent on such underlying findings of fact. *Id.* at 446. (Ginsburg, J., dissenting).

[57] *Id.* at 444-48 (Ginsburg, J., dissenting). Justice Gisnburg cited both *Gasperini* and *Browning-Ferris* for the proposition that appellate review should be limited to the abuse of discretion standard. *Id.* (Ginsburg, J., dissenting). Justice Ginsburg argued that there is no significant difference between this case and in reviewing an excessiveness challenge resting on state law or reviewing awards of compensatory damages. *Id.* at 447 (Ginsburg, J., dissenting).

[58] *Id.* at 428-29 (Ginsburg, J., dissenting). Justice Ginsburg argued that trial courts have an "undeniably superior vantage" over appellate courts in evaluating the reprehensibility of a defendant's conduct. *Id.* at 448 (Ginsburg, J., dissenting). Justice Ginsburg stated that the Court held that reprehensibility was the most important guidepost for determining excessiveness in *Gore*. *Id.* at 449 (Ginsburg, J., dissenting). Thus, Justice Ginsburg argued that trial court's superior vantage in evaluating reprehensibility counsels limiting appellate review to the abuse of discretion standard. *Id.* at 448-49 (Ginsburg, J., dissenting).

IV. DISCUSSION

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Supreme Court heightened the protections of the Due Process Clause against grossly excessive awards of punitive damages by requiring appellate review under the de novo standard.[60] The Court focused on the concept that awards of punitive damages do not represent findings of historical fact but are intended to operate as quasi-criminal fines levied against culpable defendants.[61] The decision in *Leatherman* was consistent with the Supreme Court's ongoing trend towards limiting the discretion of civil juries in determining the appropriate punishment of tortfeasors.[62] By expanding appellate review of the constitutionality of punitive damages awards the Court has exposed itself to criticism for invading the arguably rightful province of juries.[63]

The decision in *Leatherman* has given defendants an expanded opportunity to challenge punitive damages awards as grossly excessive.[64] Although the decision addressed appellate review of punitive damages awards, the decision will likely produce stricter review of punitive damages by judges at the trial court level.[65] However, given that the substantive law of the constitutionality of punitive damages is relatively well established, it remains likely that the heightened standard of appellate review announced in *Leatherman* will result in the reversal of only a small number of punitive damages awards.[66]

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[59] *Leatherman*, 532 U.S. at 450 (Ginsburg, J., dissenting). Justice Ginsburg acknowledged the standard of appellate review, whether de novo or abuse of discretion, would lead to differing outcomes in only a few cases. *Id.* (Ginsburg, J., dissenting).

[60] *See supra* notes 15, 36, 43 and accompanying text. *Leatherman* acknowledged the inherent imprecision of the constitutional determination of excessiveness and surmised that de novo review would tend to stabilize punitive damages jurisprudence. *See supra* notes 18, 43 and accompanying text.

[61] *See supra* notes 17, 40, 45 and accompanying text. The Court's focus on the moral condemnation aspect of punitive damages awards, rather than the underlying factual determinations made in assessing punitive damages, removed the potential implications of the Reexamination Clause. *See supra* notes 17, 56 and accompanying text.

[62] *See supra* 24, 36 and accompanying text. The *Leatherman* decision will act as an additional check on unbridled jury discretion by ensuring that awards of punitive damages are not the result of prejudice against unpopular defendants. *See supra* note 24 and accompanying text.

[63] *See supra* notes 36, 55 and accompanying text. Requiring de novo review of the constitutionality of punitive damages awards complicates appellate review by requiring appellate courts to separate out the underlying factual determinations made in assessing punitive damages. *See supra* note 45 and accompanying text.

[64] *See supra* notes 31, 37, 41 and accompanying text. As a consequence of

V. CONCLUSION

Cooper Industries, Inc. v. Leatherman Tool Group, Inc. provides defendants with greater opportunity to challenge awards of punitive damages as constitutionally excessive. In *Leatherman*, the Court required appellate courts to review trial court determinations of the constitutionality of awards of punitive damages under the de novo standard of review. The effect of requiring appellate review under the de novo standard will require courts of appeals to engage in an independent analysis of the *Gore* guideposts and will require appellate courts to separate out factual determinations made in awarding punitive damages. While *Leatherman* leaves the substantive constitutional inquiry of gross excessiveness untouched, the decision does afford defendants greater likelihood of a reduction of punitive damages at the appellate level. However, as a practical matter, the Court's decision will likely affect only a relatively small number of punitive damages awards. Nevertheless, *Leatherman* continues the Court's trend of re-

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strengthened appellate review, future defendants will feel more inclined to seek appellate relief from large punitive damages awards. *See supra* note 37 and accompanying text.

[65] *See supra* notes 28, 32, 37 and accompanying text. Realizing that awards of punitive damages will be subjected to intensive review by appellate courts, trial courts may increase their own scrutiny of juries' assessments of punitive damages. *See supra* note 37 and accompanying text.

[66] *See supra* notes 37, 43, 49, 59 and accompanying text. Additionally, it must be remembered that the Supreme Court left the possibility open that abuse of discretion review would be appropriate if state law linked awards of punitive damages to the jury's assessment of compensatory damages. *See supra* note 45 and accompanying text.

stricting jury discretion in imposing awards of punitive damages in hopes of freeing defendants from constitutionally excessive punitive damages awards.

R. Shane McLaughlin

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